

Court of Appeals No. 48653-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CORY JESPERSEN and MELISSA JESPERSEN,

appellants,

v.

**CLARK COUNTY, a political subdivision of the State of Washington,
and DOUGLAS LASHER, Clark County Treasurer,**

respondents.

REPLY BRIEF OF APPELLANTS

**Mark A. Erikson, WSBA #23106
Erikson & Associates, PLLC
Attorneys for Cory and Melissa
Jespersen, as appellants
110 West 13th Street
Vancouver, WA 98660-2904
Telephone (360) 696-1012
E-mail: mark@eriksonlaw.com
kris@eriksonlaw.com**

TABLE OF CONTENTS

Table of Authorities ii

Factual Corrections 1

Argument 5

 RCW 58.17.210 5

 Substantive Due Process 11

 Feasible Alternatives 13

 Value Loss 14

 Remaining Uses 15

 Anticipated Regulation 17

 Deprivation 20

 Procedural Due Process 21

 Statutory History 22

Conclusion 24

APPENDICES

Washington Statutes

RCW 58.17.010 A-1

RCW 58.17.040 A-2

RCW 58.17.210 A-4

RCW 58.17.300 A-5

RCW 84.48.010 A-6

RCW 84.64.050 A-8

Clark County Code

CCC 17.105.070(C) (as effective in 1998) A-10

CCC 18.600.100(A) (as effective in 1998) A-12

CCC 40.210.020 A-14

Table 40.210.020-2 A-17

CCC 40.520.010(F)(4) A-29

CCC 40.530.010(C)(1)(a) A-31

CCC 40.530.010(C)(1)(b) A-31

TABLE OF AUTHORITIES

Washington Cases

<i>Amunrud v. Board of Appeals</i> , 158 Wash.2d 208, 143 P.3d 571 (2006)	20, 22
<i>Anderson v. King County</i> , 200 Wash. 354, 93 P.2d 284 (1939)	5, 17
<i>Benn v. Grays Harbor County</i> , 102 Wash. 620, 173 P. 632 (1918)	21
<i>Busch v. Nervik</i> , 38 Wash.App. 541, 687 P.2d 872 (1984)	5
<i>Cradduck v. Yakima County</i> , 166 Wash.App. 435, 271 P.3d 289 (2012)	20, 22
<i>Hart v. DSHS</i> , 111 Wash.2d 445, 759 P.2d 1206 (1988)	12
<i>Johnson v. Olsen</i> , 62 Wash.2d 133, 381 P.2d 623, 625 (1963)	5
<i>Ko v. Royal Globe Insurance</i> , 20 Wash.App. 735, 583 P.2d 635, 638 (1978)	24
<i>Kramarevcky v. DSHS</i> , 122 Wash.2d 738, 863 P.2d 535 (1993)	8
<i>Newport Yacht Basin v. Supreme Northwest</i> , 168 Wash.App. 56, 277 P.3d 18 (2012)	6-7, 16
<i>Pleasant v. Regence Blue Shield</i> , 181 Wash.App. 252, 325 P.3d 237	12

<i>Presbytery v. King County</i> , 114 Wash.2d 320, 787 P.2d 907 (1990)	13, 19
<i>Record Pub. v. Monson</i> , 123 Wash. 569, 576, 213 P. 13, <i>modified</i> ,123 Wash. 569 (1923)	23
<i>Robinson v. Seattle</i> , 119 Wash.2d 34, 830 P.2d 318 (1992)	19, 20
<i>Roon v. King County</i> , 24 Wash.2d 519, 166 P.2d 165 (1946)	6
<i>Schultz v. Kolb</i> , 189 Wash. 187, 64 P.2d 79 (1937)	13
<i>Seattle Taxi v. King County</i> , 49 Wash.App. 617, 744 P.2d 1082 (1987)	16
<i>Shelton v. Klickitat County</i> , 152 Wash. 193, 277 P. 839 (1929)	5, 17
<i>State v. Cates</i> , 183 Wash.2d 531, 354 P.3d 832 (2015)	11-12
<i>State v. Hutton</i> , 57 Wash.App. 537, 789 P.2d 778 (1990)	3
<i>State v. Sanchez Valencia</i> , 169 Wash.2d 782, 239 P.3d 1059 (2010)	11-12
<i>State v. Shelton</i> , 194 Wash.App. 660, 378 P.3d 230 (2016)	11
<i>State v. Walls</i> , 81 Wash.2d 618, 503 P.2d 1068, 1070 (1972)	11

Federal Cases

de Botton v. Marple Township,
689 F.Supp. 477 (E.D.Pa.1988) 19

Herrington v. County of Sonoma,
834 F.2d 1488 (9th Cir.1987) 19

Seattle Title Trust v. Roberge,
278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928) 16

Usery v. Turner Elkhorn Mining,
428 U.S. 1, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976) 19

Washington Statutes

RCW 58.17.010 23

RCW 58.17.040 23

RCW 58.17.210 5, 6, 7, 10, 11, 16, 17

RCW 58.17.300 8

RCW 84.48.010 9, 13

Chapter 84.64 RCW 11, 12, 21

RCW 84.64.050 9, 10

Clark County Code

CCC 17.105.070(C) (as effective in 1998) 2

CCC 18.600.100(A) (as effective in 1998) 2

CCC 40.210.020 15, 16
Table 40.210.020-2 15
CCC 40.520.010(F)(4) 2
CCC 40.530.010(C)(1)(a) 17
CCC 40.530.010(C)(1)(b) 15

I. FACTUAL CORRECTIONS

Clark County alleges “[i]n 1998, the Andersons [prior owners] requested a legal lot determination from Clark County regarding whether Lot 26 and Lot 27 were *together* a legal lot of record.” *Respondent’s Brief* at 4-5 (emphasis original). Actually, what the Andersons requested is clearly stated on the first page of the *Development Review Decision* dated July 24, 1998:

Request: Determine if subject tax lots are legal lots of record
...

Legal Description: Tax lots #26 (273503) and 27 (273504)
Located in the SW ¼ of SEC 8 T5N, R#E WM

CP 43. The request sought determination that “subject tax lots” (plural) were legal, and specified *two* tax lots regarding which the request was made. It would make no sense to apply for a determination that two tax lots are one legal lot because Lot 26 was already improved with a single-family residence, *Respondent’s Brief* at 4, and such determination was not required for continued use of the property. The actual request to determine that two tax lots are separate legal lots of record would have facilitated construction of another residence on Lot 27, or sale of the lots separately. The determination that “Tax Lots 26 and 27 are one legal lot of record” was the County’s determination that they were not *separate* legal lots of record.

The Andersons originally filed an appeal of the determination, which was withdrawn in favor of a request for public interest exception under CCC 17.105.070(C) (*A-10*, as effective in 1998):

The applicant is requesting that the County recognize the subject properties, which were created in violation of platting laws, as separate legal lots of record.

CP 48. Again plural: “properties” and “lots.” Clark County granted the public interest exception subject to conditions that the applicant prove sufficient buildable area within Lot 27, or boundary adjust buildable area from Lot 26. *CP 50*. The relevant point is that conditions of approval were neither satisfied nor appealed prior to applicable deadlines provided in the County Code. *A-29* (CCC 40.520.010(F)(4)); *A-12* (CCC 18.600.100(A)). Hence, Lot 27 was not legal when subsequently foreclosed.

Contrary to the County’s allegation, development review decisions cannot be searched and retrieved by the public *independent* of County staff. *CP 381-82*. Hence, the search and retrieval process remains contingent upon staff availability, interpretation and competence. Clark County neglects to mention that the search and retrieval process failed entirely in the present case by providing a response that was categorically incorrect: “[a]s promised, please find attached the decision rendered in 1998 which recognized the

2.89-acre parcel (#27) you purchased as a legal lot of record.” *CP 223, 331* (e-mail dated February 13, 2014, from Vicki Kershner, Planner II, Department of Community Development). Contrary to Ms. Kershner’s determination, Lot 27 was never a legal lot of record. *Supra*.

Contrary to Clark County’s allegation, plaintiffs dispute that they expressly agreed to terms which were included as a prompt on an automated computer system which must be “clicked” to execute a bid. *Respondent’s Brief* at 8; *CP 144*. As noted by the Court of Appeals, “*Webster’s Dictionary* defines “expressly” as “in direct or unmistakable terms: in an express manner: EXPLICITLY, DEFINITELY, DIRECTLY.” *State v. Hutton*, 57 Wash.App. 537, 541, 789 P.2d 778 (1990); citing *Webster’s Third New International Dictionary*, 803 (1976). Black’s defines “express” as follows:

Clear; definite; explicit; plain; unmistakable; not dubious or ambiguous. Declared in terms, set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. . . . Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct. . . .

Black’s Law Dictionary 6th Ed., 1990, at 580. Inferences from the activity of pressing an automated computer prompt do not constitute clear, definite and explicit words or appropriate language necessary for *express* agreement to terms of purchase.

Plaintiffs also dispute that they failed to research legal lot status until *after* the auction was over. *Respondent's Brief*, at 8-10, 16. Clerk's papers cited by Clark County evidence that the plaintiffs did not *discover* illegal lot status prior the auction, not that they failed to *search*. *CP 328-31*. Clark County alleges that "[p]laintiffs requested a copy of the 1999 Development Review Decision for Lot 27, from Clark County (PDR #98-030)." *Respondent's Brief* at 9. That is true, but only after they had been informed of the decision by County staff. *CP 223, 331*. Clark County alleges "[p]laintiffs promptly realized that Lot 27 was currently an 'illegal lot.'" *Respondent's Brief* at 9. However, the County's citation reveals that the plaintiffs contacted legal counsel prior to their stunning revelation. *CP 121*.

Clark County cites an excerpt from proceedings to evidence post auction inquiries, *Respondent's Brief* at 8; however, the "inquiry and response" to which the County alludes was the Kershner e-mail dated February 13, 2014, *supra*, not the entire due diligence inquiry performed by the plaintiffs. Moreover, the County omits plaintiffs' explanation:

MR. ERIKSON: . . . That goes to show futility, that was futile to ask that question earlier, because we would have – if we got the wrong answer after the sale, how are we going to get a different answer before?

RP of May 1, 2015 at 38, ln. 22-25.

II. ARGUMENT

RCW 58.17.210

Clark County alleges that “*caveat emptor*” applies to tax foreclosure auctions.” *Respondent’s Brief* at 11. This argument was already addressed, based upon holding in seminal cases that *caveat emptor* prevents repayment of the purchase price in tax foreclosures “unless aided by express statutory authority.” *Brief of Appellants* at 13-15; citing *Shelton v. Klickitat County*, 152 Wash. 193, 197, 277 P. 839 (1929); *Anderson v. King County*, 200 Wash. 354, 361, 93 P.2d 284 (1939). Statutory authority was adopted under the *Subdivision Act* in 1969. *A-4* (RCW 58.17.210, 1969 ex.s. c 271 §210).

Moreover, “*caveat emptor* does not apply to a misrepresentation of a material fact made for the purpose of inducing a sale.” *Johnson v. Olsen*, 62 Wash.2d 133, 136, 381 P.2d 623, 625 (1963).

Clark County notes that the present case, like *Shelton*, “involves a refund claim . . . where the terms of sale expressly disclaimed any warranty.” *Respondent’s Brief* at 12. However, as expressly noted by the Court of Appeals, [t]he right granted [under RCW 58.17.210] is purely statutory; neither fraud nor breach of warranty need be alleged or proved.” *Busch v. Nervik*, 38 Wash.App. 541, 547, 687 P.2d 872 (1984).

Clark County admits that warranties are not implicated in the present case, but insists that the plaintiffs have failed to identify any defect in foreclosure proceedings. *Respondent's Brief* at 13-14. That is correct; however, the statute is concerned with “parcel[s] of land divided in violation of this chapter or local regulations adopted pursuant thereto.” *A-4* (RCW 58.17.210). No defect in foreclosure proceedings is required.

Even if the general common law rule of *caveat emptor* applied to tax sales, the specific rule of rescission under RCW 58.17.210 would control where the property sold is *not* a legal lot of record. “[T]he power of the court to formulate the common law is recognized only up to the time the legislature acts within its constitutional limitations upon the same subject matter.” *Roon v. King County*, 24 Wash.2d 519, 531-32, 166 P.2d 165 (1946).

A 1974 amendment of RCW 58.17.210, *Substitute House Bill 383*, removed a distinction between *innocent* and *other* purchasers or transferees. *CP 196*, ln. 18-19. This lack of distinction was clarified by the Court of Appeals in 2012 as follows:

[T]his section stipulates that any purchaser – innocent or not – may recover damages incurred as a result of buying land that has been subdivided in violation of either state or local regulations. RCW 58.17.210. Alternatively, the purchaser may choose to “rescind the sale or transfer and recover costs . . . occasioned thereby.”

Newport Yacht Basin v. Supreme Northwest, 168 Wash.App. 56, 73, 277 P.3d 18, *review denied*, 175 Wash.2d 1015 (2012). The doctrine of *caveat emptor* is concerned with the common law of contract liability for defects in performance. The holding in *Newport Yacht Basin* refutes any notion that purchasers must be innocent of defects in order to invoke *statutory* remedies of rescission, damages and attorney fees under RCW 58.17.210. *A-4*.

Contrary to the County's argument, rescission does not mean that conveyors of illegal lots will be made whole. *Respondent's Brief* at 13. The *Subdivision Act* explicitly provides that "all purchasers and transferees . . . may recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby." *A-4* (RCW 58.17.210). Conveyors of illegal lots are never made whole in such rescissions. Moreover, Clark County rejected voluntary rescission on September 22, 2014, in response to the plaintiffs' *General Liability Claim – Demand for Rescission of Treasurer's Deed. CP 200*. Hence, the County should not be heard to complain of costs attendant upon its own failure to mitigate damages.

Clark County's allegations regarding research, agreement to terms, and the non-public nature of legal lot determinations have been addressed under factual corrections above. *Respondent's Brief* at 16.

Clark County argues that “‘rescission’ is impossible in the foreclosure context.” *Respondent’s Brief* at 17. However, we are not informed how refund payments from the general fund are prohibited. As discussed below, the County that is responsible for equalization of assessed values. By analogy to equitable estoppel against government entities, enforcement may provide impetus to more adequately monitor and control equalization. *Kramarevcky v. DSHS*, 122 Wash.2d 738, 749, 863 P.2d 535 (1993).

Clark County argues that “use of the word ‘violate,’ . . . necessarily require[s] that a seller . . . must have some ability to control the legal status of the property prior to sale or, at very least, a choice in whether to sell the property.” *Respondent’s Brief* at 19.¹ The County fails to acknowledge its obligation to reduce valuations of over-valued properties on an annual basis:

The board of equalization shall meet in open session for this purpose annually on the 15th day of July and, . . . they shall examine and compare the returns of the assessment of the property of the county and proceed to equalize the same, so that each tract or lot of real property and each article or class of personal property shall be entered on the assessment list at its true and fair value, according to the measure of value used by the county assessor in such assessment year, which is presumed to be correct under RCW 84.40.0301, and subject to the following rules: . . .

¹The County also mentions criminal sanctions under RCW 58.17.300, but criminal sanctions have not been alleged in the present case. *A-5*.

Second. They shall reduce the valuation of each tract or lot or item which is returned above its true and fair value to such price or sum as to be the true and fair value thereof.

A-6 (RCW 84.48.010). The Assessor's records evidence an assessed valuation of \$105,567 for Lot 27 even though the property had sold in foreclosure for \$27,000 on February 5, 2010, and for \$28,600 on February 6, 2014. *CP 341*. Interestingly, the assessor's website reduces the "sale amount" to \$0.00 for prior foreclosures, sometime after the sale. *Id* (the 2014 sale still registers the correct sale amount, while the 2010 sale amount has been reduced to zero).

Clearly, the County failed to reduce the valuation of Lot 27 to its true and fair value prior to the 2014 foreclosure, even though the property had been over-assessed since at least February 5, 2010, when the prior foreclosure returned approximately one quarter of the assessed valuation. Hence, the County's alleged inability to avert the result in the present case should not be limited to the actions of County Treasurer in carrying out the mandates of RCW 84.64.050 (*A-8*), but should include all actions of the County that contributed to the result. While the Treasurer may have lacked discretion to impede the sale, the County had explicit authority, nay an imperative, to equalize valuations so as to reflect true and fair value prior to the foreclosure.

While there is no inconsistency between RCW 58.17.210 and RCW 84.64.050, as discussed in prior filings, *Brief of Appellants* at 10-15, any “circular, tortured [or] absurd” result perceived by the County is entirely its own making. *Respondent’s Brief* at 20; A-4; A-8. The County acknowledges that “[p]laintiffs’ . . . concept of ‘mutual’ rescission would result in Clark County owning Lot 27 for the first time ever and incurring a net loss of at least \$28,600.” *Respondent’s Brief* at 24. A small penalty for selling in foreclosure an illegal lot that had been over assessed by 300% for at least four years, not to mention the over-taxation which occurred prior to the sale and continues today.

The County argues “Washington’s cannons of statutory construction require that the more specific and *mandatory* statute supersede the general statute.” *Respondent’s Brief* at 25, emphasis added, citing *Estate of Kerr*, 134 Wash.2d 328, 343, 949 P.2d 810 (1998). To the contrary, neither the word “mandatory,” nor any of its derivatives, appears in *Kerr*, which held that specific statutes supersede general statutes if the two statutes pertain to same subject matter and conflict to extent they cannot be harmonized. *Estate of Kerr*, 134 Wash.2d at 337. The word “discretionary” does appear in *Kerr*, because the case concerned a specific statute authorizing an award of

discretionary attorney fees. *Estate of Kerr*, 134 Wash.2d at 343. Hence, the decision turned upon the dichotomy between specific and general statutes, not the County's dichotomy between mandatory and discretionary provisions. As in *Kerr*, neither the *Subdivision Act* nor *Tax Foreclosure Statutes* expressly conflict with, or preclude the operation of, the other statute. Hence, the holding *Kerr* supports enforcement of RCW 58.17.210. *A-4*.

Moreover, Clark County has mistaken the governing rule, which holds that a specific statute only supersedes as to subject matter that is *expressly contemplated*. *State v. Walls*, 81 Wash.2d 618, 622, 503 P.2d 1068, 1070 (1972). *Tax Foreclosure Statutes* do not even mention rescission.

Substantive Due Process

Clark County argues that it “has not taken any regulatory action against plaintiffs pursuant to RCW 84.64, Clark County Code or any other statute.” *Respondent's Brief* at 32. Regulatory action is not a prerequisite to substantive due process claims:

A preenforcement constitutional challenge to the mandatory DNA fee statute is ripe for review on the merits if the issue raised is primarily legal, does not require further factual development, and the challenged action is final. . . . The court must also consider the risk of hardship to the parties “if we decline to address the merits of his challenge at this time.”

State v. Shelton, 194 Wash.App. 660, 670, 378 P.3d 230 (2016); citing *State*

v. *Cates*, 183 Wash.2d 531, 534-35, 354 P.3d 832 (2015); *State v. Sanchez Valencia*, 169 Wash.2d 782, 786, 239 P.3d 1059 (2010). In *Shelton*, substantive due process claims were not ripe even though the challenge was primarily legal, and challenged action was final, because the issue concerned whether the challenger was indigent *at the time of enforcement*, which could not be determined absent enforcement. In the present case, questions for review are wholly legal as the case was presented to the trial court on cross-motions for summary judgment, which constitutes a stipulation of no material facts in dispute. *Pleasant v. Regence Blue Shield*, 181 Wash.App. 252, 261, 325 P.3d 237, *review denied*, 181 Wash.2d 1009, 335 P.3d 940 (2014).

The challenged action is final because Chapter 84.64 RCW provides no avenue for challenge of the foreclosure sale. Declining to address merits in the present case will result a situation of manifest injustice evading review. *Hart v. DSHS*, 111 Wash.2d 445, 452, 759 P.2d 1206 (1988). “The same controversy will recur,” although not “involving the same complaining party,” as the plaintiffs have discovered the risk of dealing in County foreclosures. We submit that “involving the same *property*” is a proper substitution for “involving the same complaining individuals” because, absent relief from the Court, the plaintiffs have no choice but to let the

property go to tax foreclosure in hopes of recouping some of their investment. Hence, recurrence is just as certain as in *Hart*. Plaintiffs might hope to recoup their purchase price less unpaid taxes, interest and costs, so the entire process serves only to preserve unlawful taxation on a parcel which should have been adjusted to correct valuation under RCW 84.48.010. *A-6*.

Clark County cites a 1937 Supreme Court decision for incredible circularity that the “most important governmental function [is] raising revenue to necessary to carry on the government.” *Respondent’s Brief* at 36, citing *Schultz v. Kolb*, 189 Wash. 187, 192, 64 P.2d 79 (1937). We are hopeful that the Court today would see beyond self-preservation as government’s most important function.

Feasible alternatives

Clark County misstates the plaintiffs’ burden as “proving that there is a less oppressive way to foreclose upon an auction property than administering a voluntary “As Is / Where Is” tax foreclosure auction.” *Respondent’s Brief* at 36. Plaintiffs actually bear the burden of showing “the feasibility of less oppressive solutions.” *Presbytery v. King County*, 114 Wash.2d 320, 331, 787 P.2d 907 (1990). Plaintiffs have carried this burden in their suggestion of a feasible public index of illegal lot determinations.

This function could also be provided by recording lot determinations (past and present) in title records, which would have the added benefit of preventing *private* sale of illegal lots, in the County's interest.

Value Loss

Clark County argues that plaintiffs "have not cited any *evidence* that Lot 27 has lost any value since they acquired it or that they paid too high a price." *Respondent's Brief* at 37. However, loss of value *after* purchase is not the test, particularly where the injury results from the County's practice of selling illegal lots in foreclosure without providing a public index of legal lot determinations necessary for due diligence. The plaintiffs continue to own 100% of a property that cannot be used for residential housing.

Clark County emphasizes that the sale was an "As Is / Where Is foreclosure auction;" however, this statement is half meaningful, which casts doubt on the entire disclosure. By "where is," does the County intend to avoid delivering Lot 27 to a different location? As real estate is defined by location, a "where is" disclosure makes no sense, and the listener is justified in doubting the speaker's credulity. To what exactly does the phrase "as is" refer? The conjunction "/" would imply that the terms are related. In any event, the phrase "as is" does not explicitly disclose illegal lot status.

The County argues that plaintiffs made bids which “put their own value on Lot 27.” *Respondent’s Brief* at 37. However, all buyers negotiate the purchase price; in fact, bidders at an auction generally exchange control of negotiations for the possibility of buying below market. In the present case, plaintiffs made 26 successive bids. *CP 144*, ln. 14-16; *CP 150-51*.

Remaining Uses

Clark County argues that 2.89-acre Lot 27 (*CP 44*) can be used for “farming, forestry, conservation and recreation.” *Respondent’s Brief* at 38. To the contrary, the County Code provides that “[i]llegal nonconforming lots, uses and structures shall be discontinued, terminated or brought into compliance with current standards.” *A-31* (CCC 40.530.010(C)(1)(b)). The issue is not *use* compliance but *lot* compliance. A 2.89-acre lot cannot comply with “R-10” zoning standards requiring a minimum 10-acre lot size. *A-17* (CCC Table 40.210.020-2). Clark County argues that “Lot 27 may . . . be combined with adjacent property through sale, acquisition or boundary adjustment to create a larger lot. *Respondent’s Brief* at 38. Lot 27 is bounded by a creek to the north, and streets to the east and west. *CP 52*. While there is a contiguous lot to the south (Lot 5), it is much smaller than Lot 27, and is bounded by a street to the south. *CP 52*. As Lot 27 comprises

only 2.89 acres, combination with a smaller lot will not resolve substandard lot size in a 10-acre zone.

Moreover, “[t]he right . . . to devote . . . land to any legitimate use is property within the protection of the Constitution.” *Seattle Title Trust v. Roberge*, 278 U.S. 116, 121, 49 S.Ct. 50, 52, 73 L.Ed. 210 (1928). The purpose of the “R-10” zone is “to provide lands for residential living in the rural area.” *A-14* (CCC 40.210.020(A)). That legitimate purpose emphasizes the defining fact of this appeal: if Lot 27 had been legally divided, it would be *legal* nonconforming because it was created under prior zoning which required only a one-acre minimum lot size. *CP 44*. Hence, it is *illegal* lot status that prevents use of Lot 27 for its intended purpose.

In any event, the plaintiffs have no burden of pursuing “compliance with current standards” because RCW 58.17.210 “leaves the choice of remedies to the discretion of the purchaser.” *Newport Yacht Basin*, 168 Wash.App. at 73-74; *A-4*. If the County Code forbids plaintiffs’ choice, it is pre-empted by RCW 58.17.210: “[A]n ordinance is unconstitutional if it “attempts to authorize what the Legislature has forbidden or . . . forbid[s] what the Legislature has expressly licensed, authorized, or required.”” *Seattle Taxi v. King County*, 49 Wash.App. 617, 622, 744 P.2d 1082 (1987); *A-4*.

Anticipated Regulation

Clark County argues that the plaintiffs should have anticipated “that the property being auctioned may not be ‘buildable,’” but fails to identify between which bids plaintiffs were to have conducted the extended process of determining buildability without a public index of legal lot determinations. *Respondent’s Brief* at 39. If, as the County argues, plaintiffs were aware of the legal doctrine of *caveat emptor*, then they would also be aware that it applied historically because there were no statutes authorizing rescission when the rule was articulated from 1929 to 1939. *Shelton*, 152 Wash. at 197; *Anderson*, 200 Wash. at 361. Presumably, our amateur legal scholars were also aware that remedies under RCW 58.17.210 do not exclude foreclosure sales and, in any event, that they were protected by substantive due process against arbitrary and capricious state action. Whether the plaintiffs knew that the purchase price paid at tax auctions is nonrefundable is entirely irrelevant; plaintiffs seek statutory rescission of an illegal lot sale. Clark County alleges that “zoning incongruity” should have put the plaintiffs on notice of illegal status; however, that would require them to anticipate that the County was selling illegal lots because *legal* nonconforming lots (created in compliance with regulations) are not restricted. *A-31* (CCC 40.530.010(C)(1)(a)).

Clark County argues: “Had the plaintiffs merely inquired about the legal lot status of Lot 27 prior to the auction, as they did after the sale, they would have promptly received copy of the legal lot determination and immediately recognized Lot 27’s limitations.” *Respondent’s Brief* at 39, citing *CP 331*. However, the County avoids entirely the determination provided by County staff: “As promised, please find attached the decision rendered in 1998 **which recognized the 2.89 acre parcel (#27) you purchased as a legal lot of record.**” *CP 223, 331*, emphasis added. It is highly unlikely that a layperson would question the determination of County staff regardless of the attachment. It is more likely that plaintiffs did not, and would not, become aware of staff’s error until talking with legal counsel. *CP 328* (“on February 6th . . . I called a real estate attorney and explained my situation.”) Legal counsel would have no way of investigating and analyzing the case without seeing staff’s determination and the attachment. Contrary to the County’s allegations, legal lot determinations are not available for public search; rather, the public must rely upon staff availability, interpretation and competence, which failed, entirely, in the present case. That is why the proposed alternative, a public index of legal lot determinations, is not merely appropriate, but necessary.

Clark County argues that the plaintiffs' unwillingness to pursue alternative uses fails the test in *Presbytery*. *Respondent's Brief* at 40. While the factors advocated by Professor Stoebeck "can materially assist the court," they are nonexclusive. *Presbytery*, 114 Wash.2d at 331. Hence, no individual factor results in failure to satisfy plaintiffs' burden, particularly in light of the preponderance of factors which weigh in their favor. *Brief of Appellants* at 21-25. Moreover, substantive due process does not require deprivation of all property uses:

A substantive due process claim does not require proof that all use of one's property has been denied. . . . Rather, the plaintiff must show that the interference with property rights was irrational or arbitrary. . . . Where a plaintiff seeking section 1983 relief alleges that a municipality's land use authorities violated plaintiff's rights to substantive due process, the plaintiff bears the burden of demonstrating that the governmental action was arbitrary, irrational, or tainted by improper motive.

Robinson v. Seattle, 119 Wash.2d 34, 61-62, 830 P.2d 318 (1992); citing *Herrington v. County of Sonoma*, 834 F.2d 1488, 1498 (9th Cir.1987); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976); and *de Botton v. Marple Township*, 689 F.Supp. 477, 481 (E.D.Pa.1988). County counsel strains mightily, but fails to show the foreclosure sale of illegal lots as untainted with improper motive. *Supra*.

Deprivation

Clark County alleges “it is undisputed that . . . foreclosure auction of Lot 27 advanced [a legitimate] public purpose.” *Respondent’s Brief* at 42. To the contrary, as thoroughly argued, combined enforcement of statute and ordinance without disclosure of illegal lot status utterly fails to serve the legitimate purpose of collecting tax deficiencies or regulating nonconforming lots because both purposes could be fulfilled with equal efficacy if the County maintained a public index of legal lot determinations.

Clark County argues that relief under the *Civil Rights Act* requires more than deprivation of substantive due process; proof “that the challenged government action is wholly arbitrary and capricious or irrational, or utterly fails to serve a legitimate purpose.” *Respondent’s Brief* at 42; citing *Robinson*, 119 Wash. 2d at 60-61. However, the County fails to observe that “[s]ubstantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Craddock v. Yakima County*, 166 Wash.App. 435, 442-43, 271 P.3d 289 (2012); citing *Amunrud v. Board of Appeals*, 158 Wash.2d 208, 218-19, 143 P.3d 571 (2006). Hence, County arguments that the plaintiffs “have not been deprived of an interest by

RCW 84.64” miss the point entirely. It was the *combined* enforcement of statute and ordinance without disclosure of illegal lot status that utterly failed to serve the legitimate purpose of collecting tax deficiencies or regulating nonconforming lots. Hence, “additional” requirements for relief under the *Civil Rights Act* are satisfied by and complete and thorough description of the County’s actions.

Procedural Due Process

Clark County argues that “*facial* procedural due process challenges to RCW 84.64 cannot overcome the presumption of constitutionality.” *Respondent’s Brief* at 43-46. While Chapter 84.64 may have been presumed constitutional when adopted in 1881 (Code 1881 §2917) because the legality of lots was not regulated, the interpretation of that presumption must evolve with adoption of the *Subdivision Act* in 1969 (1969 ex.s. c 271). The legislature is presumed to have enacted the *Subdivision Act* with knowledge of the *Tax Foreclosure Statute*:

It is apparent that both these statutes are general in their nature, and, if there is a conflict between them the one passed later in time should be given preference, for the Legislature must be presumed to have passed it with knowledge of existing statutes.

Benn v. Grays Harbor County, 102 Wash. 620, 622-23, 173 P. 632 (1918).

Clark County contends that the plaintiffs cannot argue as-applied procedural due process because they did not raise the issue below. *Respondents' Brief* at 46. The plaintiffs do not now raise an as-applied *procedural* due process claim; in fact, the phrase “as applied” does not occur in the *Brief of Appellants*. In anticipation that the County actually refers to plaintiffs’ claim which is based upon “combined enforcement of statute and ordinance without disclosure of illegal lot status,” that argument sounds in *substantive* due process, under holding in *Cradduck* that “[s]ubstantive due process protects against arbitrary and capricious government action even when the decision to take action is pursuant to constitutionally adequate procedures.” *Cradduck*, 166 Wash.App. at 442-43; citing *Amunrud*, 158 Wash.2d at 218-19. It would seem that the County has elected not to respond to the gravamen of plaintiffs’ argument.

Statutory History

The thrust of the County’s argument is that local governments performing mandatory duties must be exempt from rules governing other entities. This posture may be likened to a trustee claiming exemption from the *Subdivision Act* because he never actually owned the subject property, and was not trading for his own account. The *Act* provides no such exemption.

The County's posture is contrary to the stated concern which motivated the *Act*: "the process by which land is divided . . . should be administered in a uniform manner by cities, towns, and counties throughout the state." RCW 58.17.010. It would be antithetical to accord special status to the very entity that is called upon to administer *uniformity* in land division.

Moreover, the legislature may exempt its political subdivisions from statutes intended to govern the public:

The government, including the state, . . . can generally except itself and its legal subdivisions from the provisions of statutes intended to govern the public generally.

Record Pub. v. Monson, 123 Wash. 569, 576, 213 P. 13, *modified on other grounds*, 123 Wash. 569 (1923). The 1974 Substitute House Bill 383 amended the original exemption for "[d]ivisions made . . . upon court order" to include a proviso that either such divisions must: (a) be exempted under another provision of the *Act*, (b) have already been granted final approval, or (c) be conditioned upon receiving final approval. *CP 190*, ln. 14-24. Today, the *Act* contains no exemption for court ordered divisions. *A-2* (RCW 58.17.040). Given this history, it would be curious if the legislature failed to consider the court's roll in ordering tax foreclosures. Any implied exemption for court ordered foreclosures has been rescinded by the legislature.

If and when the legislature chooses to exempt political subdivisions from liability under the *Subdivision Act*, courts should enforce that exception; until then, courts should “refrain from rewriting, under the pretext of interpretation, the clearly expressed language of a legislative enactment.” *Ko v. Royal Globe Insurance*, 20 Wash.App. 735, 740 fn. 2, 583 P.2d 635, 638 (1978).

III. CONCLUSION

Superior Court erred in denying plaintiffs’ motion for summary judgment, and in granting Clark County’s cross-motion, as to liability under the *Subdivision Act* because RCW 58.17.210 provides a remedy available to “all purchasers or transferees,” without regard to knowledge of defects, and because express statutory language supersedes the common law principle of *caveat emptor*. This result is mandated by Supreme Court holding in *Shelton v. Klickitat County* (1929) and *Anderson v. King County* (1939) that tax foreclosures are not subject to rescission without “express statutory authority,” which legislature enacted in 1969. Moreover, *Tax Foreclosure* statutes do not supersede RCW 58.17.210 because they do *not* deal with the same subject matter. Even if they did, there is no contradiction between the obligations to foreclose tax delinquencies and rescind sales of illegal lots.

Superior Court also erred in ruling on substantive due process because Clark County's combined enforcement of *Tax Foreclosure Statutes* and regulations implementing the *Subdivision Act*, without providing a public index of legal lot determinations, was arbitrary and irrational, even if the individual statutes are constitutionally adequate. The present situation is destined to recur, albeit with different players, because the only solution for buyers of illegal lots is to withhold property tax payments in hopes of recouping a portion of their investment through subsequent foreclosure. Plaintiffs have carried their burden of showing feasible alternatives in the County's provision of a public index of legal lot determinations. They have shown total value loss because there are no remaining uses for substandard acreage which cannot be remedied, under an ordinance requiring that the nonconformity be discontinued or terminated.

Judgment should be granted in favor of the plaintiffs.

RESPECTFULLY SUBMITTED this 12th day of October, 2016.

ERIKSON & ASSOCIATES, PLLC
Attorneys for the appellants

By: _____

Mark A. Erikson, WSBA #23106

CERTIFICATE OF SERVICE

#48653-9-II

I certify that on the 12th day of October, 2016, I caused a true and correct copy of the foregoing *Reply Brief of Appellants* to be served on the following in the manner indicated below:

Counsel for the respondents:

Taylor Hallvik
Deputy Prosecuting Attorney
Clark County, Washington
1300 Franklin Street Suite 380
Vancouver, WA 98666
E-mail: taylor.hallvik@clark.wa.gov

US Mail
 Hand Delivery
 E-mail, as agreed by recipient

By: *Kris Eklove*
Kris Eklove

West's Revised Code of Washington Annotated
Title 58. Boundaries and Plats (Refs & Annos)
Chapter 58.17. Plats--Subdivisions--Dedications (Refs & Annos)

West's RCWA 58.17.010

58.17.010. Purpose

Currentness

The legislature finds that the process by which land is divided is a matter of state concern and should be administered in a uniform manner by cities, towns, and counties throughout the state. The purpose of this chapter is to regulate the subdivision of land and to promote the public health, safety and general welfare in accordance with standards established by the state to prevent the overcrowding of land; to lessen congestion in the streets and highways; to promote effective use of land; to promote safe and convenient travel by the public on streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage, parks and recreation areas, sites for schools and schoolgrounds and other public requirements; to provide for proper ingress and egress; to provide for the expeditious review and approval of proposed subdivisions which conform to zoning standards and local plans and policies; to adequately provide for the housing and commercial needs of the citizens of the state; and to require uniform monumenting of land subdivisions and conveyancing by accurate legal description.

Credits

[1981 c 293 § 1; 1969 ex.s. c 271 § 1.]

West's RCWA 58.17.010, WA ST 58.17.010

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West's Revised Code of Washington Annotated
Title 58. Boundaries and Plats (Refs & Annos)
Chapter 58.17. Plats--Subdivisions--Dedications (Refs & Annos)

West's RCWA 58.17.040

58.17.040. Chapter inapplicable, when

Currentness

The provisions of this chapter shall not apply to:

- (1) Cemeteries and other burial plots while used for that purpose;
- (2) Divisions of land into lots or tracts each of which is one-one hundred twenty-eighth of a section of land or larger, or five acres or larger if the land is not capable of description as a fraction of a section of land, unless the governing authority of the city, town, or county in which the land is situated shall have adopted a subdivision ordinance requiring plat approval of such divisions: PROVIDED, That for purposes of computing the size of any lot under this item which borders on a street or road, the lot size shall be expanded to include that area which would be bounded by the center line of the road or street and the side lot lines of the lot running perpendicular to such center line;
- (3) Divisions made by testamentary provisions, or the laws of descent;
- (4) Divisions of land into lots or tracts classified for industrial or commercial use when the city, town, or county has approved a binding site plan for the use of the land in accordance with local regulations;
- (5) A division for the purpose of lease when no residential structure other than mobile homes or travel trailers are permitted to be placed upon the land when the city, town, or county has approved a binding site plan for the use of the land in accordance with local regulations;
- (6) A division made for the purpose of alteration by adjusting boundary lines, between platted or unplatted lots or both, which does not create any additional lot, tract, parcel, site, or division nor create any lot, tract, parcel, site, or division which contains insufficient area and dimension to meet minimum requirements for width and area for a building site;
- (7) Divisions of land into lots or tracts if: (a) Such division is the result of subjecting a portion of a parcel or tract of land to either chapter 64.32 or 64.34 RCW subsequent to the recording of a binding site plan for all such land; (b) the improvements constructed or to be constructed thereon are required by the provisions of the binding site plan to be included in one or more condominiums or owned by an association or other legal entity in which the owners of units therein or their owners' associations have a membership or other legal or beneficial interest; (c) a city, town, or county has approved the binding site plan for all such land; (d) such approved binding site plan is recorded in the county or counties in which such land is located; and (e) the binding site plan contains thereon the following statement: "All development and use of the land described herein shall be in accordance with this binding site plan, as it may be amended with the approval of the city, town, or county having jurisdiction over the development of such land, and in accordance with

such other governmental permits, approvals, regulations, requirements, and restrictions that may be imposed upon such land and the development and use thereof. Upon completion, the improvements on the land shall be included in one or more condominiums or owned by an association or other legal entity in which the owners of units therein or their owners' associations have a membership or other legal or beneficial interest. This binding site plan shall be binding upon all now or hereafter having any interest in the land described herein." The binding site plan may, but need not, depict or describe the boundaries of the lots or tracts resulting from subjecting a portion of the land to either chapter 64.32 or 64.34 RCW. A site plan shall be deemed to have been approved if the site plan was approved by a city, town, or county: (i) In connection with the final approval of a subdivision plat or planned unit development with respect to all of such land; or (ii) in connection with the issuance of building permits or final certificates of occupancy with respect to all of such land; or (iii) if not approved pursuant to (i) and (ii) of this subsection (7)(e), then pursuant to such other procedures as such city, town, or county may have established for the approval of a binding site plan;

(8) A division for the purpose of leasing land for facilities providing personal wireless services while used for that purpose. "Personal wireless services" means any federally licensed personal wireless service. "Facilities" means unstaffed facilities that are used for the transmission or reception, or both, of wireless communication services including, but not necessarily limited to, antenna arrays, transmission cables, equipment shelters, and support structures; and

(9) A division of land into lots or tracts of less than three acres that is recorded in accordance with chapter 58.09 RCW and is used or to be used for the purpose of establishing a site for construction and operation of consumer-owned or investor-owned electric utility facilities. For purposes of this subsection, "electric utility facilities" means unstaffed facilities, except for the presence of security personnel, that are used for or in connection with or to facilitate the transmission, distribution, sale, or furnishing of electricity including, but not limited to, electric power substations. This subsection does not exempt a division of land from the zoning and permitting laws and regulations of cities, towns, counties, and municipal corporations. Furthermore, this subsection only applies to electric utility facilities that will be placed into service to meet the electrical needs of a utility's existing and new customers. New customers are defined as electric service locations not already in existence as of the date that electric utility facilities subject to the provisions of this subsection are planned and constructed.

Credits

[2004 c 239 § 1, eff. June 10, 2004; 2002 c 44 § 1; 1992 c 220 § 27; 1989 c 43 § 4-123. Prior: 1987 c 354 § 1; 1987 c 108 § 1; 1983 c 121 § 2; prior: 1981 c 293 § 3; 1981 c 292 § 2; 1974 ex.s. c 134 § 2; 1969 ex.s. c 271 § 4.]

West's RCWA 58.17.040, WA ST 58.17.040

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

West's Revised Code of Washington Annotated
Title 58. Boundaries and Plats (Refs & Annos)
Chapter 58.17. Plats--Subdivisions--Dedications (Refs & Annos)

West's RCWA 58.17.210

58.17.210. Building, septic tank or other development permits not to be issued for land
divided in violation of chapter or regulations--Exceptions--Damages--Rescission by purchaser

Effective: June 10, 2010
Currentness

No building permit, septic tank permit, or other development permit, shall be issued for any lot, tract, or parcel of land divided in violation of this chapter or local regulations adopted pursuant thereto unless the authority authorized to issue such permit finds that the public interest will not be adversely affected thereby. The prohibition contained in this section shall not apply to an innocent purchaser for value without actual notice. All purchasers' or transferees' property shall comply with provisions of this chapter and each purchaser or transferee may recover his or her damages from any person, firm, corporation, or agent selling or transferring land in violation of this chapter or local regulations adopted pursuant thereto, including any amount reasonably spent as a result of inability to obtain any development permit and spent to conform to the requirements of this chapter as well as cost of investigation, suit, and reasonable attorneys' fees occasioned thereby. Such purchaser or transferee may as an alternative to conforming his or her property to these requirements, rescind the sale or transfer and recover costs of investigation, suit, and reasonable attorneys' fees occasioned thereby.

Credits

[2010 c 8 § 18005, eff. June 10, 2010; 1974 ex.s. c 134 § 10; 1969 ex.s. c 271 § 21.]

West's RCWA 58.17.210, WA ST 58.17.210

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West's Revised Code of Washington Annotated
Title 58. Boundaries and Plats (Refs & Annos)
Chapter 58.17. Plats--Subdivisions--Dedications (Refs & Annos)

West's RCWA 58.17.300

58.17.300. Violations--Penalties

Currentness

Any person, firm, corporation, or association or any agent of any person, firm, corporation, or association who violates any provision of this chapter or any local regulations adopted pursuant thereto relating to the sale, offer for sale, lease, or transfer of any lot, tract or parcel of land, shall be guilty of a gross misdemeanor and each sale, offer for sale, lease or transfer of each separate lot, tract, or parcel of land in violation of any provision of this chapter or any local regulation adopted pursuant thereto, shall be deemed a separate and distinct offense.

Credits

[1969 ex.s. c 271 § 32.]

West's RCWA 58.17.300, WA ST 58.17.300

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West's Revised Code of Washington Annotated
Title 84. Property Taxes (Refs & Annos)
Chapter 84.48. Equalization of Assessments (Refs & Annos)

West's RCWA 84.48.010

84.48.010. County board of equalization--Formation--Per diem--Meetings--
Duties--Records--Correction of rolls--Extending taxes--Change in valuation,
release or commutation of taxes by county legislative authority prohibited

Currentness

Prior to July 15th, the county legislative authority shall form a board for the equalization of the assessment of the property of the county. The members of said board shall receive a per diem amount as set by the county legislative authority for each day of actual attendance of the meeting of the board of equalization to be paid out of the current expense fund of the county: PROVIDED, That when the county legislative authority constitute the board they shall only receive their compensation as members of the county legislative authority. The board of equalization shall meet in open session for this purpose annually on the 15th day of July and, having each taken an oath fairly and impartially to perform their duties as members of such board, they shall examine and compare the returns of the assessment of the property of the county and proceed to equalize the same, so that each tract or lot of real property and each article or class of personal property shall be entered on the assessment list at its true and fair value, according to the measure of value used by the county assessor in such assessment year, which is presumed to be correct under RCW 84.40.0301, and subject to the following rules:

First. They shall raise the valuation of each tract or lot or item of real property which is returned below its true and fair value to such price or sum as to be the true and fair value thereof, after at least five days' notice shall have been given in writing to the owner or agent.

Second. They shall reduce the valuation of each tract or lot or item which is returned above its true and fair value to such price or sum as to be the true and fair value thereof.

Third. They shall raise the valuation of each class of personal property which is returned below its true and fair value to such price or sum as to be the true and fair value thereof, and they shall raise the aggregate value of the personal property of each individual whenever the aggregate value is less than the true valuation of the taxable personal property possessed by such individual, to such sum or amount as to be the true value thereof, after at least five days' notice shall have been given in writing to the owner or agent thereof.

Fourth. They shall reduce the valuation of each class of personal property enumerated on the detail and assessment list of the current year, which is returned above its true and fair value, to such price or sum as to be the true and fair value thereof; and they shall reduce the aggregate valuation of the personal property of such individual who has been assessed at too large a sum to such sum or amount as was the true and fair value of the personal property.

Fifth. The board may review all claims for either real or personal property tax exemption as determined by the county assessor, and shall consider any taxpayer appeals from the decision of the assessor thereon to determine (1) if the taxpayer is entitled to an exemption, and (2) if so, the amount thereof.

The clerk of the board shall keep an accurate journal or record of the proceedings and orders of said board showing the facts and evidence upon which their action is based, and the said record shall be published the same as other proceedings

of county legislative authority, and shall make a true record of the changes of the descriptions and assessed values ordered by the county board of equalization. The assessor shall correct the real and personal assessment rolls in accordance with the changes made by the said county board of equalization, and the assessor shall make duplicate abstracts of such corrected values, one copy of which shall be retained in the office, and one copy forwarded to the department of revenue on or before the eighteenth day of August next following the meeting of the county board of equalization.

The county board of equalization shall meet on the 15th day of July and may continue in session and adjourn from time to time during a period not to exceed four weeks, but shall remain in session not less than three days: PROVIDED, That the county board of equalization with the approval of the county legislative authority may convene at any time when petitions filed exceed twenty-five, or ten percent of the number of appeals filed in the preceding year, whichever is greater.

No taxes, except special taxes, shall be extended upon the tax rolls until the property valuations are equalized by the department of revenue for the purpose of raising the state revenue.

County legislative authorities as such shall at no time have any authority to change the valuation of the property of any person or to release or commute in whole or in part the taxes due on the property of any person.

Credits

[2001 c 187 § 22; 1997 c 3 § 109 (Referendum Bill No. 47, approved November 4, 1997); 1988 c 222 § 20; 1979 c 13 § 1. Prior: 1977 ex.s. c 290 § 2; 1977 c 33 § 1; 1970 ex.s. c 55 § 2; 1961 c 15 § 84.48.010; prior: 1939 c 206 § 35; 1925 ex.s. c 130 § 68; RRS § 11220; prior: 1915 c 122 § 1; 1907 c 129 § 1; 1897 c 71 § 58; 1893 c 124 § 59; 1890 p 555 § 73; Code 1881 §§ 2873-2879. Formerly RCW 84.48.010, 84.48.020, 84.48.030, 84.48.040, and 84.48.060.]

West's RCWA 84.48.010, WA ST 84.48.010

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

West's Revised Code of Washington Annotated
Title 84. Property Taxes (Refs & Annos)
Chapter 84.64. Lien Foreclosure (Refs & Annos)

West's RCWA 84.64.050

84.64.050. Certificate to county--Foreclosure--Notice--Sale
of certain residential property eligible for deferral prohibited

Effective: July 28, 2013
Currentness

(1) After the expiration of three years from the date of delinquency, when any property remains on the tax rolls for which no certificate of delinquency has been issued, the county treasurer must proceed to issue certificates of delinquency on the property to the county for all years' taxes, interest, and costs. However, the county treasurer, with the consent of the county legislative authority, may elect to issue a certificate for fewer than all years' taxes, interest, and costs to a minimum of the taxes, interest, and costs for the earliest year.

(2) Certificates of delinquency are prima facie evidence that:

(a) The property described was subject to taxation at the time the same was assessed;

(b) The property was assessed as required by law;

(c) The taxes or assessments were not paid at any time before the issuance of the certificate;

(d) Such certificate has the same force and effect as a lis pendens required under chapter 4.28 RCW.

(3) The county treasurer may include in the certificate of delinquency any assessments which are due on the property and are the responsibility of the county treasurer to collect. However, if the department of revenue has previously notified the county treasurer in writing that the property has a lien on it for deferred property taxes, the county treasurer must include in the certificate of delinquency any amounts deferred under chapters 84.37 and 84.38 RCW that remain unpaid, including accrued interest and costs.

(4) The treasurer must file the certificates when completed with the clerk of the court at no cost to the treasurer, and the treasurer must thereupon, with legal assistance from the county prosecuting attorney, proceed to foreclose in the name of the county, the tax liens embraced in such certificates. Notice and summons must be served or notice given in a manner reasonably calculated to inform the owner or owners, and any person having a recorded interest in or lien of record upon the property, of the foreclosure action to appear within thirty days after service of such notice and defend such action or pay the amount due. Either (a) personal service upon the owner or owners and any person having a recorded interest in or lien of record upon the property, or (b) publication once in a newspaper of general circulation, which is circulated in the area of the property and mailing of notice by certified mail to the owner or owners and any person having a recorded interest in or lien of record upon the property, or, if a mailing address is unavailable, personal service upon the occupant

of the property, if any, is sufficient. If such notice is returned as unclaimed, the treasurer must send notice by regular first-class mail. The notice must include the legal description on the tax rolls, the year or years for which assessed, the amount of tax and interest due, and the name of owner, or reputed owner, if known, and the notice must include the local street address, if any, for informational purposes only. The certificates of delinquency issued to the county may be issued in one general certificate in book form including all property, and the proceedings to foreclose the liens against the property may be brought in one action and all persons interested in any of the property involved in the proceedings may be made codefendants in the action, and if unknown may be therein named as unknown owners, and the publication of such notice is sufficient service thereof on all persons interested in the property described therein, except as provided above. The person or persons whose name or names appear on the treasurer's rolls as the owner or owners of the property must be considered and treated as the owner or owners of the property for the purpose of this section, and if upon the treasurer's rolls it appears that the owner or owners of the property are unknown, then the property must be proceeded against, as belonging to an unknown owner or owners, as the case may be, and all persons owning or claiming to own, or having or claiming to have an interest therein, are hereby required to take notice of the proceedings and of any and all steps thereunder. However, prior to the sale of the property, the treasurer must order or conduct a title search of the property to be sold to determine the legal description of the property to be sold and the record title holder, and if the record title holder or holders differ from the person or persons whose name or names appear on the treasurer's rolls as the owner or owners, the record title holder or holders must be considered and treated as the owner or owners of the property for the purpose of this section, and are entitled to the notice provided for in this section. Such title search must be included in the costs of foreclosure.

(5) If the title search required by subsection (4) of this section reveals a lien in favor of the state for deferred taxes on the property under RCW 84.37.070 or 84.38.100 and such deferred taxes are not already included in the certificate of delinquency, the county treasurer must issue an amended certificate of delinquency on the property to include the outstanding amount of deferred taxes, including accrued interest. The amended certificate of delinquency must be filed with the clerk of the court as provided in subsection (4) of this section.

(6) The county treasurer may not sell property that is eligible for deferral of taxes under chapter 84.38 RCW but must require the owner of the property to file a declaration to defer taxes under chapter 84.38 RCW.

Credits

[2013 c 221 § 12, eff. July 28, 2013; 1999 c 18 § 7; 1991 c 245 § 25; 1989 c 378 § 37; 1986 c 278 § 64. Prior: 1984 c 220 § 19; 1984 c 179 § 2; 1981 c 322 § 4; 1972 ex.s. c 84 § 2; 1961 c 15 § 84.64.050; prior: 1937 c 17 § 1; 1925 ex.s. c 130 § 117; RRS § 11278; prior: 1917 c 113 § 1; 1901 c 178 § 3; 1899 c 141 § 15; 1897 c 71 § 98.]

<(Formerly: Certificates of delinquency)>

West's RCWA 84.64.050, WA ST 84.64.050

Current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016

17.105.060 Approval criteria.

A. Basic Criteria. Parcels which meet both of the following basic criteria are lots of record:

1. Zoning. The parcel meets minimum zoning requirements, including lot size, dimensions and frontage width, in effect currently or at the time the parcel was created; and

2. Platting.

a. The parcel was created through a subdivision or short plat recorded with Clark County; or

b. The parcel is five (5) acres or more in size and was created through any of the following:

i. An exempt division which occurred prior to April 19, 1993,

ii. A tax segregation requested prior to April 19, 1993,

iii. A survey completed as to boundaries prior to April 19, 1993 and recorded prior to July 19, 1993; or

c. The parcel was created through a division or segregation of four or fewer lots requested prior to July 1, 1976; or

d. The parcel was created through division or segregation and was in existence prior to August 21, 1969; or

e. The parcel was created through court order, will and testament, or other process listed as exempt from platting requirements by RCW 58.17.035, 58.17.040, or Section 17.103.020 of this code, or through an exemption from platting regulations provided by law at the time of creation of the parcel; or

f. The parcel was segregated at any time and is twenty (20) acres or more in size.

B. Prior Determination. Parcels which have been recognized through a previous lot determination review, or other county planning approval in which lot recognition is made, are lots of record. Such parcels shall remain lots of record until changed by action of the owner.

C. Parcels which have been appropriately merged by the county assessor at the request of the property owners for tax purposes shall not retain their status as individual parcels or lots prior to the merger, unless the planning director finds that the merger was requested without knowledge of the consequences, that

a reduction in appraised value of forty-five thousand dollars (\$45,000) per lot merged was not realized, and that the lots can be recognized under public interest exception criteria of Section 17.080.070(C). Adjacent, common ownership lots of record taxed separately, or parcels merged without owner consent shall retain any such historical status.

D. Dormant territorial plats lots created through land divisions which were recorded prior to 1937, and not subsequently developed or improved shall not be considered legal lots of record under the basic criteria of subsection (A)(2) of this section, although they may be recognized if they meet other approval criteria of this chapter. (Sec. 1 of Ord. 1998-02-09)

17.105.070 Exceptions.

A. Innocent Purchaser Exception. The planning director shall determine that parcels which meet both of the following exception criteria are lots of record:

1. Zoning. The parcel meets minimum zoning dimensional requirements, including lot size, dimensions and frontage width, which are currently in effect or in effect at the time the parcel was created; and

2. Platting. The current property owner purchased the property for value and in good faith, and did not have knowledge of the fact that the property acquired was divided from a larger parcel after August 21, 1969 in the case of subdivisions, or after July 1, 1976 in the case of short plats, or after April 19, 1993 in the case of any segregation resulting in parcels of five (5) acres or larger.

B. Public Interest Exception, Mandatory. The planning director shall determine that parcels which meet both of the following criteria are lots of record:

1. Date of Creation. The lot was created before January 1, 1995.

2. Zoning. The parcel meets minimum zoning dimensional requirements currently in effect, including lot size, dimensions and frontage width; and

3. Platting.

a. The planning director determines that improvements or conditions of approval which would have been imposed if the parcel had been established

through platting are already present and completed;
or

b. The property owner completes conditions of approval which the planning director determines would otherwise be imposed if the parcel had been established through platting under current standards. Preliminary and final submittal plans shall be required where applicable.

C. Public Interest Exception, Discretionary. The planning director may, but is not obligated to determine that parcels meeting the following criteria are lots of record:

1. Zoning. The parcel lacks sufficient area or dimension to meet current zoning requirements but meets minimum zoning dimensional requirements, including lot size, dimensions and frontage width, in effect at the time the parcel was created; and

2. Platting.

a. The planning director determines that conditions of approval which would have been imposed if the parcel been established through platting under current standards are already present on the land; or

b. The property owner completes conditions of approval which the planning director determines would otherwise be imposed if the parcel had been established through platting under current standards. Preliminary and final submittal plans shall be required where applicable.

3. The planning director shall apply the following factors in making a lot of record determination under the discretionary public interest exception.

a. The parcel size is generally consistent with surrounding lots of record within one thousand (1000) feet,

b. Recognition that the parcel does not adversely impact health or safety,

c. Recognition of the parcel does not adversely affect, or interfere with the implementation of the comprehensive plan,

d. The parcel purchase value and subsequent tax assessments are consistent with a buildable lot of record.

D. Recognition of lot of record status based on the public interest exception shall be valid for five (5) years from the date of lot determination or review in

which the determination was made. If a building or other development permit is not sought within that time, the determination will expire. Applications for development or lot recognition submitted after five (5) years shall require compliance with applicable standards at that time. (Sec. 1 of Ord. 1998-02-09; amended by Sec. 5 of Ord. 2003-02-16)

17.105.075 De minimus lot size standard.

For the purposes of reviewing the status of pre-existing lots for compliance with platting and zoning standards, parcels within one (1) percent of minimum lot size requirements shall be considered in compliance with those standards. Parcels within ten (10) percent of lot size standards shall be similarly considered in compliance unless the planning director determines that public health or safety impacts are present. (Sec. 1 of Ord. 1998-02-09)

17.105.080 Potential remedial measures.

Transfer or sale of properties created in violation of land division regulations is a gross misdemeanor pursuant to RCW 58.17.300. Buyers of property not in compliance with lot of record criteria, including exceptions, listed in this chapter may consider pursuing one (1) or more of the following, listed in no particular order:

A. Purchase of additional land from surrounding properties if necessary to reach compliance with zoning standards, and subsequent boundary line adjustment which does not result in any other parcels becoming inconsistent with minimum zoning standards.

B. Private action to seek damages, including the cost of investigation and suit from the selling party if the property was transferred in violation of applicable zoning and platting regulations, as authorized by RCW 58.17.210.

C. Private action to rescind the sale or transfer, and recover cost of investigation and suit from the selling party if the property was transferred in violation of applicable zoning and platting regulations, as authorized by RCW 58.17.210.

D. Application for a variance if necessary to reach compliance with zoning standards. Such applications will be reviewed solely under variance crite-

2. That the planning commission recommends against or in favor of approval of the application(s) with or without certain changes, or that the planning commission will recommend neither against nor for approval of the application(s), together with a brief summary of the basis for the recommendation.

F. At least fifteen (15) calendar days before the date of the first board of commissioners hearing for an application subject to Type IV review, the planning director shall:

1. Prepare a notice that includes the information listed in subsection (B)(1) of this section except the notice shall be modified as needed:

- a. To reflect any changes made in the application(s) during the planning commission review,
- b. To reflect that the board of commissioners will conduct the hearing and the place, date and time of the board of commissioners hearing, and
- c. To state that the planning commission recommendation, staff report, and SEPA evaluation are available for inspection at no cost and copies will be provided at reasonable cost;

2. Mail a copy of that notice to the parties identified in subsection (B)(2) of this section and to parties who request it in writing;

3. Publish in a newspaper of general circulation a summary of the notice, including the date, time and place of the hearing and a summary of the subject of the Type IV process; and

4. Provide other notice deemed appropriate and necessary by the planning director based on the subject of the Type IV process.

G. At the conclusion of its initial hearing regarding a Type IV application, the board of commissioners may continue the hearing or may adopt, modify or give no further consideration to the application or recommendations. If the hearing is continued to a place, date and time certain, then additional notice of the continued hearing is not required to be provided. If the hearing is not continued to a place, date and time certain, then notice of the continued hearing shall be given as though it was the initial hearing before the board of commissioners. (Sec. 31 of Ord. 1995-01-26; amended by Sec. 4 (Att. A) of Ord. 1996-04-28)

18.600.100 Appeal procedure.

A. A final decision regarding an application subject to a Type I procedure may be appealed by any interested party. A final decision regarding an application (including preliminary short and long plats) subject to a Type II or III procedure may be appealed only by a party of record. Final decisions regarding Type I, II or III applications may be appealed only if, within fourteen (14) calendar days after written notice of the decision is mailed, a written appeal is filed with the planning director for appeal of a Type I or II decision and with the board of commissioners for a Type III decision.

B. The appeal shall contain the following information:

- 1. The case number designated by the county and the name of the applicant;
- 2. The name and signature of each petitioner and a statement showing that each petitioner is entitled to file the appeal under subsection A of this section. If multiple parties file a single petition for review, the petition shall designate one party as the contact representative for all contact with the planning director. All contact with the planning director regarding the petition, including notice, shall be with this contact representative;
- 3. The specific aspect(s) of the decision and/or SEPA issue being appealed, the reasons why each aspect is in error as a matter of fact or law, and the evidence relied, on to prove the error.

If the appeal concerns a Type III decision, and the petitioner wants to introduce new evidence in support of the appeal, the written appeal also must explain why such evidence should be considered, based on the criteria in subsection (D)(2) of this section; and

4. The appeal fee adopted by the board of commissioners; provided, the fee shall be refunded if the appellant files with the planning director at least fifteen (15) calendar days before the appeal hearing a written statement withdrawing the appeal.

C. The hearings examiner shall hear appeals of Type I and II decisions in a de novo hearing. Notice of an appeal hearing shall be mailed to parties entitled to notice of the decision, but shall not be posted

or published. A staff report shall be prepared, a hearing shall be conducted, and a decision shall be made and noticed and can be appealed as for a Type III process.

D. The board of commissioners shall hear appeals of Type III decisions on the record, including all materials received in evidence at any previous stage of the review, an audio or audio/visual tape of the prior hearing(s) or transcript of the hearing(s) certified as accurate and complete, the final order being appealed, and argument by the parties.

1. Board of commissioners' consideration of an appeal shall be scheduled as provided for in Chapter 2.51 of this code. The board may either decide the appeal at the designated meeting or continue the matter to a limited hearing for receipt of oral argument. If so continued, the board shall:

a. Designate the parties or their representatives to present argument, and the permissible length thereof, in a manner calculated to afford a fair hearing of the issues specified by the board; and

b. At least fifteen (15) calendar days before such hearing, provide mailed notice thereof to parties entitled to notice of the decision being appealed under Section 18.600.080F, which notice shall indicate that only legal argument from designated parties will be heard.

2. At the conclusion of its public meeting or limited hearing for receipt of oral legal argument, the board of commissioners may affirm, reverse, modify or remand an appealed decision.

a. A decision to remand a matter is not appealable. Appeal from a decision on remand shall be treated as any other decision.

b. If the board affirms an appealed decision, then the board shall adopt a final order that contains the conclusions the board reached regarding the specific grounds for appeal and the reasons for those conclusions. The board may adopt the decision of the lower review authority as its decision to the extent that decision addresses the merits of the appeal or may alter that decision.

c. If the board reverses or modifies an appealed decision, then the board shall adopt a final order that contains:

i. A statement of the applicable criteria and standards in this code and other applicable law relevant to the appeal;

ii. A statement of the facts that the board finds show the appealed decision does not comply with applicable approval criteria or development standards;

iii. The reasons for a conclusion to modify or reverse the decision; and

iv. The decision to modify or reverse the decision and, if approved, any conditions of approval necessary to ensure the proposed development will comply with applicable criteria and standards.

3. The board of commissioners' office shall mail notice of a board of commissioners' decision on the merits of an appeal to parties entitled to notice under Section 18.600.080F of this chapter and other parties who appeared orally or in writing before the board regarding the appeal. The notice shall consist of the board decision or of a statement identifying the case by number and applicant's name and summarizing the board's decision. The notice shall include a statement that the decision can be appealed to superior court within twenty-one (21) calendar days and, where applicable, shall comply with the official notice provisions of RCW 43.21C.075. (Sec. 31 of Ord. 1995-01-26; amended by Sec. 4 (Att. A) of Ord. 1996-04-28; amended by Sec. 24 of Ord. 1998-11-02)

18.600.102 Special appeal procedure applicable to uses licensed or certified by the department of social and health services or the department of corrections.

In accordance with RCW § 35.63.260 (Section 1, Chapter 119, Laws of 1998), prior to the filing of an appeal of a final decision by a hearing examiner involving a conditional use permit application requested by a party that is licensed or certified by the department of social and health services or the department of corrections, the aggrieved party must, within five days after the final decision, initiate formal mediation procedures in an attempt to resolve the parties' differences. If, after initial evaluation of

40.210.020 Rural Districts (R-20, R-10, R-5)**A. Purpose.**

The rural districts are intended to provide lands for residential living in the rural area. Natural resource activities such as farming and forestry are allowed and encouraged in conjunction with the residential uses in the area. These areas are subject to normal and accepted forestry and farming practices.

B. Uses.

The uses set out in Table 40.210.020-1 are examples of uses allowable in the various rural zone districts. The appropriate review authority is mandatory.

- "P" – Uses allowed subject to approval of applicable permits.
- "R/A" – Uses permitted upon review and approval as set forth in Section 40.520.020.
- "C" – Conditional uses which may be permitted subject to the approval of a conditional use permit as set forth in Section 40.520.030.
- "X" – Uses specifically prohibited.

Where there are special use standards or restrictions for a listed use, the applicable code section(s) in Chapter 40.260, Special Uses and Standards, or other applicable chapter is noted in the "Special Standards" column.

Table 40.210.020-1. Uses				
	R-20	R-10	R-5	Special Standards
1. Residential.				
a. Single-family dwellings and accessory buildings, including 1 guest house	P	P	P	<u>40.260.010</u>
b. Family day care centers	P	P	P	<u>40.260.160</u>
c. Adult family homes	P	P	P	<u>40.260.190</u>
d. Home business – Type I	P	P	P	<u>40.260.100</u>
e. Home business – Type II	R/A	R/A	R/A	<u>40.260.100</u>
f. Bed and breakfast establishments (up to 2 guest bedrooms)	R/A	R/A	R/A	<u>40.260.050</u>
g. Bed and breakfast establishments (3 or more guest bedrooms)	C	C	C	<u>40.260.050</u>
h. Country inns of historic significance	C	C	C	
i. Garage sales	P	P	P	<u>40.260.090</u>
j. Residential care homes	C	C	C	<u>40.260.180</u>
k. Temporary dwellings	P	P	P	<u>40.260.210</u>
l. Staffed residential homes	C	C	C	<u>40.260.205</u>
2. Services, Business.				

Table 40.210.020-1. Uses				
	R-20	R-10	R-5	Special Standards
a. Commercial nurseries predominantly marketing locally produced plants and associated landscaping materials	R/A	R/A	R/A	
b. Roadside farm stand	P	P	P	<u>40.260.025</u>
c. Agricultural market	P	P	P	<u>40.260.025</u>
d. Veterinary clinics	C	C	C	
e. Commercial kennels on a parcel or parcels 5 acres or more	R/A	R/A	R/A	<u>40.260.110</u>
f. Private kennels	P	P	P	<u>40.260.110</u>
g. Animal boarding and day use facilities	P	P	P	<u>40.260.040</u>
3. Services, Amusement.				
a. Publicly owned recreational facilities, services, parks and playgrounds ⁴	P	P	P	<u>40.260.157</u>
b. Private recreation facilities, such as country clubs and golf courses, including such intensive commercial recreational uses as golf driving range, race track, amusement park, paintball facilities, or gun club	C	C	C	
c. Golf courses	C	C	C	
d. Equestrian facility on parcels less than 5 acres	C	C	C	<u>40.260.040</u>
e. Equestrian facility on parcels 5 acres or greater	P	P	P	<u>40.260.040</u>
f. Equestrian events center	C	C	C	<u>40.260.040</u>
g. Outdoor public entertainments, amusements and assemblies	R/A	R/A	R/A	Chapter <u>5.32</u>
h. Tasting room and event facilities in conjunction with a winery	P	P	P	<u>40.260.245</u>
4. Services, Membership Organization.				
a. Churches	C	C	C	
5. Services, Educational. ⁴				
a. Public or private schools, but not including business, dancing or technical schools ⁴	C	C	C	<u>40.260.160</u>
6. Public Service and Facilities. ⁴				
a. Ambulance dispatch facilities ⁴	C	C	C	<u>40.260.030</u>
b. Government facilities ⁴	C ¹	C ¹	C ¹	

Table 40.210.020-1. Uses				
	R-20	R-10	R-5	Special Standards
7. Resource Activities.				
a. Agricultural and forestry, including any accessory buildings and activities	P	P	P	<u>40.260.080</u>
b. Silviculture	P	P	P	<u>40.260.080</u>
c. Commercial uses supporting agricultural and forestry resource uses	p ²	p ²	p ²	
d. Housing for temporary workers	P	P	P	<u>40.260.105</u>
8. Other.				
a. Private use landing strips for aircraft and heliports	C	C	C	<u>40.260.170</u>
b. Solid waste handling and disposal sites	C	C	C	<u>40.260.200</u>
c. Utilities, structures and uses including but not limited to utility substations, pump stations, wells, watershed intake facilities, gas and water transmission lines	P	P	P	<u>40.260.240</u>
d. Wireless communications facilities	P/C ³	P/C ³	P/C ³	<u>40.260.250</u>
e. Cemeteries and mausoleums, crematoria, columbaria, and mortuaries within cemeteries; provided, that no crematoria is within two hundred (200) feet of a lot in a residential district.	C	C	C	
f. Temporary uses	P	P	P	<u>40.260.220</u>
g. Electric vehicle infrastructure	P	P	P	<u>40.260.075</u>
h. Medical marijuana collective gardens	X	X	X	
i. Marijuana-related facilities	X	X	X	

¹ Government facilities necessary to serve the area outside urban growth boundaries, including fire stations, ambulance dispatch facilities and storage yards, warehouses, or similar uses.

² Commercial uses supporting agricultural and forestry resource uses, such as packing, first stage processing and processing which provides value added to resource products.

³ See Table 40.260.250-1.

⁴ Once a property has been developed as a public facility, a docket is required to change the comprehensive plan designation from the current zone to the Public Facilities zone.

Amended: Ord. 2003-12-15; Ord. 2005-04-12; Ord. 2007-06-05; Ord. 2010-08-06; Ord. 2010-10-02; Ord. 2011-03-09; Ord. 2011-06-14; Ord. 2011-08-08; Ord. 2011-12-09; Ord. 2012-02-03; Ord. 2012-02-08; Ord. 2012-06-02; Ord. 2012-12-23; Ord. 2013-07-08; Ord. 2014-05-07; Ord. 2014-11-02; Ord. 2016-06-12)

C. Development Standards.

1. Unless otherwise permitted under Section 40.210.020(D) (Rural Cluster Development), new lots and structures and additions to structures subject to this section shall comply with the applicable standards for lots and building height, and setbacks in Tables 40.210.020-2 and 40.210.020-3, subject to the provisions of Chapter 40.200 and Section 40.550.020.

Zoning District	Minimum Lot Area (acres) ¹	Minimum Lot Width (feet)	Minimum Lot Depth (feet)
R-20	20 acres or legally described as one thirty-second (1/32) of a section	330	None
R-10	10 acres or legally described as one sixty-fourth (1/64) of a section	330	None
R-5	5 acres or legally described as one one hundred and twenty-eighth (1/128) of a section	140 ²	None

¹ Utilities, structures and uses including but not limited to utility substations, pump stations, wells, watershed intake facilities, gas and water transmission lines and telecommunication facilities may be permitted on newly approved lots of less than the minimum parcel size

² Unless a greater width shall be required by the Clark County fire code.

Zoning District	Minimum Setbacks ⁴			Maximum Lot Coverage	Maximum Building Height (feet)	
	Front (feet)	Side	Rear (feet)			
		Street (feet)	Interior (feet)			
R-20	50 ⁵	25	20, 50 ¹	20, 50 ²	N/A	35 ³
R-10	50 ⁵	25	20, 50 ¹	20, 50 ²	N/A	35 ³
R-5	50 ⁵	25	20, 50 ¹	20, 50 ²	N/A	35 ³

¹ Side Setback. Minimum side setback on each side of the residential dwelling and incidental buildings shall be twenty (20) feet, and fifty (50) feet for accessory buildings used for agricultural purposes. Side setbacks from abutting property zoned for natural resource or surface mining uses shall be a minimum of fifty (50) feet for all structures.

² *Rear Setback. Minimum rear setback shall be fifty (50) feet when abutting property zoned for natural resource or surface mining uses.*

³ *Residential buildings only.*

⁴ *Nonconforming lots subject to the provisions of Section 40.530.010(D)(2).*

⁵ *From public road right-of-way, private road easement or tract, or private driveway easement that provides access to the lot.*

(Amended: Ord. 2005-04-12; Ord. 2010-08-06; Ord. 2012-07-03)

2. Previous Land Divisions. Until the affected property is included within an urban growth boundary, no remainder lot of a previously approved cluster land division or lot reconfiguration shall be:

- a. Further subdivided or reduced in size below seventy percent (70%) of the total developable area of the original parent parcel constituting the cluster subdivision; or
- b. Reduced by a total of more than one (1) acre.
- c. Applications for reduction in remainder lot size consistent with this provision shall be processed as a plat alteration pursuant to Section 40.540.120.
- d. An exception to Sections 40.210.020(C)(2)(a) and (b) may be allowed as follows:

(1) A remainder lot with an existing residence may be short platted further to contain the residence on its own cluster lot, subject to the following:

- (a) Process. Creation of the new cluster lot is subject to the requirements of Section 40.540.030;
- (b) Lot Size. The new cluster lot shall not be greater than one (1) acre in size, unless a greater size is required by Clark County Public Health;
- (c) The new cluster lot must meet the requirements of Section 40.210.020(D)(3)(b) and the lot dimension and setback requirements of Tables 40.210.020-4 and 40.210.020-5;
- (d) The reduced remainder shall not be further divided and shall be subject to the requirements in Sections 40.210.020(D)(3)(c)(2)(a)(i) and (ii).

3. Signs. Signs shall be permitted according to the provisions of Chapter 40.310.

4. Off-Street Parking. Off-street parking shall be provided as required in Chapter 40.340.

(Amended: Ord. 2011-08-08; Ord. 2014-01-08)

D. Rural Cluster Development.

1. Purpose. The purpose of this section is to provide for small lot residential development in the rural zoning districts (R-5, R-10 and R-20) which maintains rural character, maintains and conserves larger remainder parcels, protects and/or enhances sensitive environmental and wildlife habitat areas, and minimizes impacts to necessary public services. These goals are achieved by allowing the placement of homes on a small portion of the property while maintaining the majority of the site in a remainder parcel. This is consistent with the goals and policies of the Growth Management Act, especially the provisions for innovative development techniques to conserve open space and resource lands.
2. Definitions. For the purposes of this section, the following definitions shall apply:
 - a. "Building envelope" shall mean that buildable portion of a lot or parcel (the area outside of setbacks and easements) which is designated on the final plat for the location of a structure.
 - b. "Critical lands," for the purposes of this section, shall mean those lands classified by Chapter 40.440 as habitat areas, by Chapter 40.450 as any wetland category and associated buffers, by Chapter 40.430 as landslide hazard areas, all lands subject to Shoreline Management Act jurisdiction by Chapter 40.460, and all lands within a designated one hundred (100) year floodplain or floodway by Chapter 40.420.
 - c. "Remainder parcel" shall mean the remainder parcel of the cluster provision that contains the majority of the land within the development and is devoted to open space, resource or other authorized use.
3. Development Standards.
 - a. Maximum Density. Cluster developments are allowed a maximum density equivalent to that which would be permitted by applying the otherwise applicable minimum lot size requirements of this section. The density shall be based on one hundred ten percent (110%) of the gross area of the site.
 - b. Cluster Lots.
 - (1) Cluster lots shall be sited to minimize conflicts between housing and adjacent agricultural or forest zoned property.
 - (2) Cluster lots and building envelopes may not include critical areas unless no other alternative exists. If no alternative is available, encroachment into these areas shall be limited to the least amount possible consistent with applicable critical areas ordinances.
 - c. Remainder Parcel.
 - (1) The remainder parcel shall be contiguous. Fragmentation of the parcel by public or private road easements and/or building sites shall not occur unless no other reasonable alternative exists. The remainder parcel shall provide a buffer for the cluster lots from adjacent lands in a resource

zoning district. Remainder parcels shall also be located adjacent to other bordering remainder parcels or public parks and open space. To the maximum extent possible, all critical areas and any associated buffers existing on property proposed for cluster development shall be located within the remainder parcel. In order to retain the rural character the remainder parcel should contain to the maximum extent possible forested areas, prominent hillsides, meadows and ridges.

(2) There are two (2) ways of utilizing the maximum density allowed within a cluster development, as follows:

(a) The creation of cluster lots equal to no more than the maximum allowed density, with a remainder parcel that can be used only for the agriculture and forestry uses as listed in Table 40.210.020-1(7)(a), (b) and (d) or as open space. An example of this would be a twenty (20) acre parcel in the R-5 district, where four (4) cluster lots and one (1) remainder are created. All of the allowed density is used on the cluster lots, and the remainder parcel can only be used as open space or for agriculture or forestry uses.

(i) If this option is used, an open space, equestrian, farm or forest management plan is required for the remainder parcel. The plan shall be submitted and approved with the preliminary application. The plan shall identify permitted uses and management of the parcel so that it maintains its open space or other designated functions and provides for the protection of all critical areas. The management plan shall identify the responsibility for maintaining the remainder parcel. The plan shall also include any construction activities (trails, fencing, agricultural buildings) and vegetation clearing that may occur on site. The plan shall include building envelopes for any proposed equestrian facility. This building envelope must be located outside of any critical areas including fish and wildlife habitat areas, riparian corridors, geologic hazard areas, areas of significant natural vegetation, wetlands, prominent hillsides, meadows, ridges and any buffers associated with the above areas. All subsequent activities must be conducted in conformance with the approved management plan. Management plans may be modified through a Type II process.

(ii) A note shall be placed on the plat and a restrictive covenant shall be recorded that clearly states that only the above uses are permitted on the parcel. The note and covenant shall also incorporate the management plan, as described above.

(b) The creation of cluster lots equal to no more than one (1) less than the maximum allowed density with a remainder parcel that can also be developed. If this option is used, the remainder parcel may contain the uses listed in Table 40.210.020-1. An example of this would be a twenty (20) acre parcel in the R-5 district, where three (3)

Table 40.210.020-5. Setbacks, Lot Coverage and Building Height - Rural Cluster Development

Table 40.210.020-5. Setbacks, Lot Coverage and Building Height - Rural Cluster Development. The above class, less one (1), is used on the cluster lots. This permits the remainder parcel to be developed with any of the uses normally allowed in the rural districts. If the remainder parcel is to be residentially developed, a building envelope shall be delineated on the final plat. This building envelope must be located outside of any critical areas including fish and wildlife habitat areas, riparian corridors, geologic hazard areas, areas of significant natural vegetation, wetlands, prominent hillsides, meadows, ridges and any buffers associated with the above areas. This requirement shall not apply to pre-existing residences located on the remainder lot.

4. Lot Requirements. New lots and structures and additions to structures subject to this section shall comply with the applicable standards for lots and building height, and setbacks in Tables 40.210.020-4 and 40.210.020-5, subject to the provisions of Chapter 40.200 and the Section 40.550.020.

Lot Type	Zoning District	Minimum Lot Area	Maximum Lot Size	Minimum Lot Width (feet)	Minimum Lot Depth (feet)
Cluster Lot	R-20, R-10, R-5	1 acre ¹	None ²	100 ³	140
Remainder Lot	R-5	65% of site	None ²	None	None
	R-20, R-10	75% of site	None ²	None	None

¹ Unless a larger size is required by the Clark County Health Department. Cluster lots can use right-of-way to meet the minimum lot size as permitted by Section 40.200.040(C)(1).

² The minimum standard for remainder parcels controls the maximum size of cluster lots.

³ Unless a greater width shall be required by the Clark County fire code.

Zoning District and Lot Type	Location or Structure Type	Minimum Setbacks			Maximum Lot Coverage	Maximum Building Height (feet)
		Front (feet)	Side (feet)	Rear (feet)		
R-20, R-10, and R-5 - Cluster Lots and Remainder Lots	Abutting a cluster lot	20	20	20	N/A	35 ²
	Abutting a resource district	200 ¹	200 ¹	200 ¹		
	Agricultural structures	50	50	50		
	Vehicle entry gates or garage door openings	20	20	20		
	All other situations	50	20	50		

¹ Except in cases where it can be shown that a lesser setback will provide the same or greater buffering or where requiring the normal setback will result in the location of the building sites within inappropriate areas such as wildlife habitat or wetland areas or the dimensions of the development site render it unbuildable.

² Residential buildings only.

(Amended: Ord. 2007-06-05)

5. Design Requirements. The design requirements for cluster developments are listed below. These requirements shall be recorded on the plat.
 - a. No entryway treatments, monument or other permanent development signs are permitted. This shall not be construed to prohibit landscaping.
 - b. Sight-obscuring fences of any height are not permitted within fifty (50) feet of the public right-of-way, nor along cluster lot lines adjacent to the remainder lot. Sight-obscuring fences are at least fifty percent (50%) opaque.
 - c. To the maximum practicable extent, existing historic rural features shall be preserved as part of the cluster development. These features include but are not limited to rock walls, fences, functional and structurally safe farm buildings, monuments and landscape features.
6. Landscaping Standards. Cluster developments shall be landscaped within the developed portion of cluster lots, so as to reduce views of the development from the public right(s)-of-way so that a filtered view is provided of the cluster and the cluster does not dominate the landscape.
 - a. At a minimum, proposed or existing landscaping and vegetation shall be of sufficient size and type to provide a buffer of vegetation six (6) feet in height and fifty percent (50%) opaque year round within three (3) years of planting. New landscaping materials shall consist of native vegetation as identified by the Clark Conservation District. A combination of trees and shrubs must be used.
 - b. All landscaping shall be installed prior to final plat unless financial guarantees are made for its installation prior to any building permit activity. Any required landscaping materials that fail to survive within the first two (2) years shall be promptly replaced.
7. Previously Approved Cluster and Lot Reconfiguration Remainder Lots. Previously approved cluster or lot reconfiguration remainder lots are not eligible to use the provisions of this section.
8. Procedures. Cluster land divisions shall be processed in accordance with the established procedures for land divisions under Chapter 40.540.
9. Notice of Resource Activities. Where otherwise undevelopable cluster remainder parcels are designated for commercial timber or agricultural activities the following notice shall be recorded as part of the Developer Covenants to Clark County for each parcel within the cluster:

The subject property is adjacent to commercial agricultural or forest lands on which a variety of commercial activities may occur that are not compatible with residential development. Potential discomforts or inconvenience may include, but are not limited to: Noise, odors, fumes, dust, smoke, insects, operation of machinery (including aircraft) during any twenty-four (24) hour period, storage and disposal of manure, and the application by spraying or otherwise of chemical fertilizers, soil amendments, herbicides and pesticides.

10. Additional Development Standards for Equestrian Cluster.
 - a. Utilization of maximum density shall be consistent with the method described in Section 40.210.020(D)(3)(a).
 - b. An equestrian cluster is required to provide the following shared facilities on the site:
 - i. Covered riding arena to be located on the remainder lot within development envelopes not to exceed two (2) acres.
 - ii. Continuous internal trail(s) system with access to all equestrian facilities and lots. The trails shall connect with existing and future trails.
 - c. An equestrian plan that addresses the following shall be developed and implemented:
 - i. Housing and confinement;
 - ii. Animal husbandry;
 - iii. Manure management; and
 - iv. Odor and noise management.
 - d. Landscaping Standards.
 - i. The perimeter of the cluster lots and the equestrian facilities shall be screened from abutting properties per Section 40.210.020(D)(6)(a).
 - e. If shared boarding facilities are proposed they shall be located on the remainder lot within development envelopes not to exceed two (2) acres and shall accommodate a minimum number of horses equal to the number of cluster lots in the proposed development. The shared boarding facility shall include the following features:
 - i. Wash rack.
 - ii. Grooming stand.
 - iii. Tack room.
 - f. The remainder lot in the final development plan that includes shared equestrian facilities, including trails, structures and/or landscaping shall be permanently maintained by and conveyed to the following:

- i. An association of owners shall be formed and continued for the purpose of maintaining the shared equestrian facilities. The association shall be created as an association of owners under the laws of the state and shall adopt and propose articles of incorporation or association and bylaws, and adopt and improve a declaration of covenants and restrictions on the shared equestrian facility that is acceptable to the prosecuting attorney, in providing for the continuing care of the facilities. No equestrian facilities may be put to a use not specified in the final development plan unless the final development plan is first amended to permit the use. No change of use may be considered as a waiver of any covenants limiting the use of shared equestrian facilities, and all rights to enhance these covenants against any use permitted are expressly reserved.

- g. A proposal with shared boarding facilities shall have cluster lots that are a minimum of one acre in size unless a larger size is required by the Clark County health department.

(Amended: Ord. 2005-04-12; Ord. 2005-06-09; Ord. 2007-11-13; Ord. 2012-12-20; Ord. 2012-12-23; Ord. 2014-01-08)

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40.520.010 Legal Lot Determination

A. Purpose and Summary.

1. The purpose of this section is to provide a process and criteria for determining whether parcels are lots of record consistent with applicable state and local law, and to include a listing of potential remedial measures available to owners of property which do not meet the criteria.
2. In summary, parcels are lots of record if they were in compliance with applicable laws regarding zoning and platting at the time of their creation. Zoning laws pertain primarily to the minimum lot size and dimensions of the property. Platting laws pertain primarily to the review process used in the creation of the lots. Specific provisions are listed herein.

B. Applicability.

The standards of this section apply to all requests for lot determinations, or for building permit, placement permit, site plan review, short plat, subdivision, conditional use permit, rezone, or comprehensive plan change application.

C. Determination Process.

Lot of record status may be formally determined through the following ways:

1. Lot Determinations as Part of a Building Permit or Other Development Request. Building or other development applications for new principal structures on parcels which are not part of a platted land division shall be reviewed by the county for compliance with the criteria standards of this section, according to the timelines and procedures of the building permit or other applicable review involved. Lot determination fees pursuant to Title 6 shall be assessed, unless the parcel was recognized through a previous lot determination or other review in which such recognition was made. Lot determination fees will be assessed for placement or replacement of primary structures. A separate written approval will not be issued unless requested by the applicant. Request for determinations based on the innocent purchaser or public interest exception criteria of this chapter shall require separate submittal under Section 40.520.010(C)(2).
2. Lot Determinations Requests Submitted Without Other Development Review. Requests for determinations of lot of record status not involving any other county development reviews, or any requests for innocent purchaser or mandatory public interest exceptions shall submit an application for lot determination, with fees assessed pursuant to Title 6 of this code. A Type I process per Section 40.510.010 shall be used, unless the request is based on the public interest exception discretionary criteria of Section 40.520.010(F)(3), in which case Type II reviews as per Section 40.510.020 will be used. The county will issue a letter of determination in response to all such requests.

(Amended: Ord. 2008-06-02)

D. Application and Submittal Requirements.

1. The following shall be submitted with all applications for lot determination, or applications for other development review in which a lot determination is involved. Applicants are encouraged to submit material as necessary to demonstrate compliance with this section.
 - a. Prior county short plat, subdivision, lot determination or other written approvals, if any, in which the parcel was formally created or determined to be a lot of record;
 - b. Sales or transfer deed history dating back to 1969;
 - c. Prior segregation request, if any;
 - d. Prior recorded survey, if any;
 - e. At the discretion of the applicant, any other information demonstrating compliance with criteria of this section.
2. Requests for the innocent purchaser exception shall also include a written explanation of the circumstances surrounding the purchase of the property which demonstrates compliance with innocent purchaser criteria of Section 40.520.010(F)(1). Additional documentation such as earnest money agreements, written affidavits, previous tax statements or property advertisements may be included at the discretion of the applicant.
3. Requests for the public interest exception shall also include a written explanation which demonstrates compliance with applicable public interest exception criteria of this chapter.

E. Approval Criteria.

1. Basic Criteria. Parcels which meet both of the following basic criteria are lots of record:
 - a. Zoning. The parcel meets minimum zoning requirements, including lot size, dimensions and frontage width, in effect currently or at the time the parcel was created; and
 - b. Platting.
 - (1) The parcel was created through a subdivision or short plat recorded with Clark County; or
 - (2) The parcel is five (5) acres or more in size and was created through any of the following:
 - (a) An exempt division which occurred prior to April 19, 1993,
 - (b) A tax segregation requested prior to April 19, 1993,

- (c) A survey completed as to boundaries prior to April 19, 1993, and recorded prior to July 19, 1993; or
 - (3) The parcel was created through a division or segregation of four (4) or fewer lots requested prior to July 1, 1976; or
 - (4) The parcel was created through division or segregation and was in existence prior to August 21, 1969; or
 - (5) The parcel was created through court order, will and testament, or other process listed as exempt from platting requirements by RCW 58.17.035, 58.17.040, or Section 40.540.010(A), or through an exemption from platting regulations provided by law at the time of creation of the parcel; or
 - (6) The parcel was segregated at any time and is twenty (20) acres or more in size.
2. Prior Determination. Parcels which have been recognized through a previous lot determination review, or other county planning approval in which lot recognition is made, are lots of record. Such parcels shall remain lots of record until changed by action of the owner.
 3. Dormant territorial plats lots created through land divisions which were recorded prior to 1937, and not subsequently developed or improved shall not be considered legal lots of record under the basic criteria of Section 40.520.010(E) (1)(b), although they may be recognized if they meet other approval criteria of this chapter.
 4. Parcels created as a result of government condemnation for road construction under Section 40.540.020(B)(4)(c) do not qualify as legal lots in the Columbia River Gorge National Scenic Area District, as specified under the definition of "parcel" in Section 40.240.040.

(Amended: Ord. 2004-06-11; Ord. 2005-04-12; Ord. 2007-06-05)

F. Exceptions.

1. Innocent Purchaser Exception. The responsible official shall determine that parcels which meet both of the following exception criteria are lots of record:
 - a. Zoning. The parcel meets minimum zoning dimensional requirements, including lot size, dimensions and frontage width, which are currently in effect or in effect at the time the parcel was created; and
 - b. Platting. The current property owner purchased the property for value and in good faith, and did not have knowledge of the fact that the property acquired was divided from a larger parcel after August 21, 1969, in the case of subdivisions, or after July 1, 1976, in the case of short plats, or after April 19, 1993, in the case of any segregation resulting in parcels of five (5) acres or larger.

2. Public Interest Exception, Mandatory. The responsible official shall determine that parcels which meet the following criteria are lots of record:
 - a. Date of Creation. The lot was created before January 1, 1995;
 - b. Zoning. The parcel meets minimum zoning dimensional requirements currently in effect, including lot size, dimensions and frontage width; and
 - c. Platting.
 - (1) The responsible official determines that improvements or conditions of approval which would have been imposed if the parcel had been established through platting are already present and completed; or
 - (2) The property owner completes conditions of approval such as, but not limited to, road, sidewalk, and stormwater improvements which the responsible official determines would otherwise be imposed if the parcel had been established through platting under current standards. Preliminary and final submittal plans and fees shall be required where applicable. Such plans may include final engineering plans and a final land division plan in lieu of a final plat.
3. Public Interest Exception, Discretionary. The responsible official may, but is not obligated to, determine that parcels meeting the following criteria are lots of record:
 - a. Zoning. The parcel lacks sufficient area or dimension to meet current zoning requirements but meets minimum zoning dimensional requirements, including lot size, dimensions and frontage width, in effect at the time the parcel was created; and
 - b. Platting.
 - (1) The responsible official determines that conditions of approval which would have been imposed if the parcel been established through platting under current standards are already present on the land; or
 - (2) The property owner completes conditions of approval such as, but not limited to, road, sidewalk, and stormwater improvements which the responsible official determines would otherwise be imposed if the parcel had been established through platting under current standards. Preliminary and final submittal plans and fees shall be required where applicable. Such plans may include final engineering plans and a final land division plan in lieu of a final plat.
 - c. The responsible official shall apply the following factors in making a lot of record determination under the discretionary public interest exception:
 - (1) The parcel size is generally consistent with surrounding lots of record within one thousand (1,000) feet;

- (2) Recognition of the parcel does not adversely impact public health or safety;
 - (3) Recognition of the parcel does not adversely affect or interfere with the implementation of the comprehensive plan; and
 - (4) The parcel purchase value and subsequent tax assessments are consistent with a buildable lot of record.
4. Recognition of lot of record status based on the public interest exception shall be valid for five (5) years from the date of lot determination or review in which the determination was made. If a building or other development permit is not sought within that time, the determination will expire. Applications for development or lot recognition submitted after five (5) years shall require compliance with applicable standards at that time.

(Amended: Ord. 2009-03-02)

G. De Minimis Lot Size Standard.

For the purposes of reviewing the status of pre-existing lots for compliance with platting and zoning standards, parcels within one percent (1%) of minimum lot size requirements shall be considered in compliance with those standards. Parcels within ten percent (10%) of lot size standards shall be similarly considered in compliance unless the responsible official determines that public health or safety impacts are present.

H. Potential Remedial Measures.

Transfer or sale of properties created in violation of land division regulations is a gross misdemeanor pursuant to RCW 58.17.300. Buyers of property not in compliance with lot of record criteria, including exceptions, listed in this section may consider pursuing one (1) or more of the following, listed in no particular order:

1. Purchase of additional land from surrounding properties if necessary to reach compliance with zoning standards, and subsequent boundary line adjustment which does not result in any other parcels becoming inconsistent with minimum zoning standards.
2. Private action to seek damages, including the cost of investigation and suit from the selling party if the property was transferred in violation of applicable zoning and platting regulations, as authorized by RCW 58.17.210.
3. Private action to rescind the sale or transfer, and recover cost of investigation and suit from the selling party if the property was transferred in violation of applicable zoning and platting regulations, as authorized by RCW 58.17.210.
4. Application for a variance if necessary to reach compliance with zoning standards. Such applications will be reviewed solely under variance criteria of Section 40.550.020, and shall not be granted on the basis of illegal lot status.

5. Application for zoning changes under Section 40.560.020 and/or comprehensive plan changes under Section 40.560.010 if an alternative designation can bring the parcel into lot of record status. Such plan and zone change requests shall be reviewed solely according to their compliance with respective criteria of Section 40.560.020 and/or Section 40.560.010, and shall not be granted on the basis of illegal lot status.

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40.530.010 Nonconforming Lots, Structures and Uses

A. Purpose.

Lots, uses, and structures exist which were lawful when established but whose establishment would be restricted or prohibited under current zoning regulations. The intent of this chapter is to allow continuation of such nonconforming uses and structures. It is also the intent of this chapter to, under certain circumstances and controls, allow modifications to nonconforming uses and structures consistent with the objectives of maintaining the economic viability of such uses and structures while protecting the rights of surrounding property owners to use and enjoy their properties.

B. Applicability.

All nonconforming lots, uses and structures shall be subject to provisions of this chapter.

1. If a lot, use or structure deemed legal nonconforming under past zoning regulations is brought into compliance with current standards, it shall be considered conforming.
2. The provisions in this chapter do not supersede or relieve a property owner from compliance with building, fire, health or other life safety requirements of the code.

C. Nonconforming Status.

1. Any lot, use, or structure which, in whole or part, is not in conformance with current zoning requirements shall be considered as follows:
 - a. Legal Nonconforming. Lots, uses and structures legally created or established under prior zoning and/or platting regulations. These lots, uses and structures may be maintained or altered subject to provisions of this chapter.
 - b. Illegal Nonconforming. Lots, uses and structures which were not in conformance with applicable zoning and/or platting regulations at the time of creation or establishment. Illegal nonconforming lots, uses and structures shall be discontinued, terminated or brought into compliance with current standards.
2. It shall be the burden of a property owner or proponent to demonstrate the legal nonconformity of a lot, use, and structure.

D. Legal Nonconforming Lots.

A legal lot of record, as defined in Section 40.100.070 and created as a building site, which does not conform to minimum lot area, width or depth requirements of the zoning district in which it is currently situated may be developed, subject to the following:

1. A permitted use or structure shall meet all existing development standards of the zoning district within which it is located including, but not limited to, required yards/setbacks, lot coverage, density, parking, landscaping, storm drainage, signage, and road standards.
2. For the purpose of establishing setbacks from property lines, any residential lot of record in the rural (R-5, R-10 and R-20), resource (FR-80 and FR-20, AG-10, and AG-WL), urban reserve (UR-10 and UR 20) and urban holding (UH-10 and UH-20) districts which has a smaller lot area, width and/or depth than that required by the zone in which it is located may use that residential zoning classification which most closely corresponds to the area or dimensions of the lot of record.
3. A legal nonconforming lot shall not be further diminished in size or dimension unless approved through a lot reconfiguration under Section 40.210.010(D) or Section 40.230.070(C)(2).
4. A legal nonconforming lot may be increased in size to bring it into closer conformance with area requirements of the zone in which it is located.
5. A legal nonconforming lot which is increased in area or dimension such that it is brought into compliance with any or all of the lot requirements for the zoning district in which it is located shall thereafter remain in compliance.
6. A legal lot of record that is reduced through governmental action or adverse possession below, or further below the required minimum size of the zoning district in which it is located shall be deemed a legal nonconforming lot, subject to review through a Type I process.

(Amended: Ord. 2012-07-03; Ord. 2016-06-12)

E. Legal Nonconforming Buildings or Structures.

A legally established building or structure may continue to be used or occupied by a use permitted in the zoning district in which it is currently located even though it does not comply with present development standards (e.g., setbacks, lot coverage, density, height, etc.) of said zone. The legal nonconforming building or structure may be maintained as follows:

1. Maintenance and Repair.

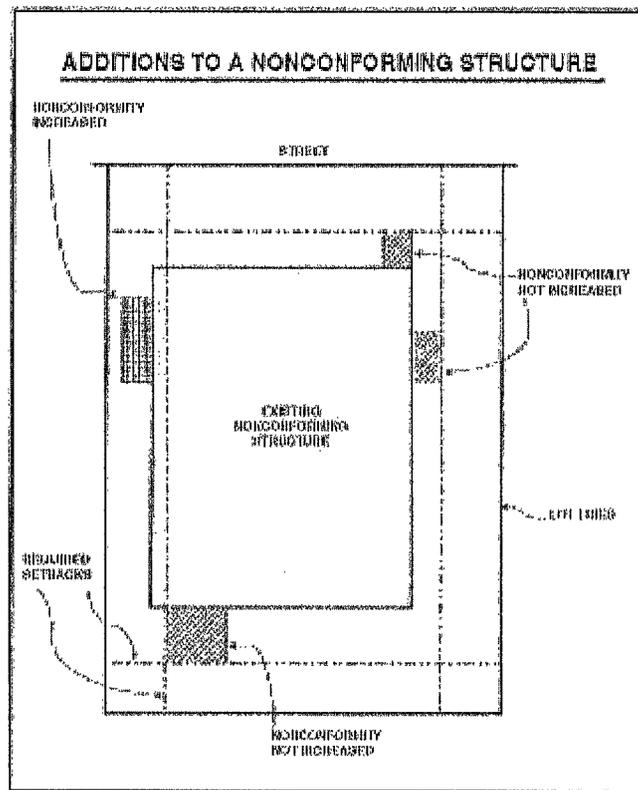
Ordinary repairs to correct deterioration or wear may be made to legal nonconforming structures. Minor maintenance and repair includes such things as painting, roof repair and replacement, plumbing, wiring, mechanical equipment replacement, and weatherization.

2. Expansion or Structural Alteration.

A legal nonconforming building or structure may be expanded, enlarged, or structurally altered, provided the modification meets applicable development standards for the zoning district in which it located. In no case shall said modification increase the building or structure's nonconformity. Expansion of

nonresidential and multifamily buildings or structures may require site plan approval.

Figure 40.530.010-1



3. Restoration of Damaged Building or Structure.

A legal nonconforming building or structure that is damaged by fire, flood, explosion, wind, earthquake, war, riot, calamity or other catastrophic event may be restored or repaired as follows:

a. Partial Destruction.

If the extent of damage does not exceed sixty percent (60%) of either the square footage or assessed value of such building or structure as established by the most current County Assessor's tax roll, the building or structure may be reconstructed to the footprint existing immediately prior to the time of partial destruction, provided:

- (1) A building permit for said restoration shall be applied for within one (1) year of the date of damage or disaster.
- (2) Restoration/reconstruction shall be completed within two (2) years of the date of partial destruction.
- (3) Upon receiving a written request, the responsible official may, through a Type I review process, extend the above time limitations due to special circumstances beyond the control of the owner of said building or structure.

b. Substantial Destruction.

If the extent of damage exceeds sixty percent (60%) of either the square footage or assessed value of such building or structure as established by the most current County Assessor's tax roll, the building or structure shall not be repaired or reconstructed unless it conforms to development requirements of the zoning district in which it is located.

4. Relocation.

A legal nonconforming building or structure shall not be relocated on the same lot unless said move results in bringing the building or structure into compliance with requirements of the zoning district in which it is situated.

5. Signs.

Legal nonconforming signs are subject to provisions in Section 40.310.010(H).

F. Legal Nonconforming Uses.

Any lawfully established nonconforming use or development may be continued at the same gross floor area or land coverage occupied on the effective date of the ordinance codified in this title, or any amendment thereto, that made the use no longer permissible. Use of these buildings and land are subject to the following:

1. Establishment of Legal Nonconforming Status.

- a. Any person may request a determination through a Type I process regarding legal status of a nonconforming use.
- b. Evidence submitted by the applicant shall demonstrate that the use was lawfully created or established in accordance with the zoning regulations in existence at that time, and that said use has been maintained continuously since the time zoning regulations governing the land changed. Acceptable documentation may consist of, but is not limited to, such items as:
 - (1) Dated business receipts showing types of service or goods provided;
 - (2) Statements or records from utilities, such as power, water or gas, which indicate the date and type of use;
 - (3) Business licenses;
 - (4) Property rental invoices or receipts;
 - (5) Income tax records;
 - (6) Dated listings in telephone, business or Polk directories;
 - (7) Records of the County Assessor;
 - (8) Building, land use or development permits;

- (9) Dated photographs, newspaper clippings, and other relevant documentation; or
- (10) Notarized affidavits from neighbors or persons who have observed the nonconforming use over the required period of time may assist in substantiating its presence but shall not be the primary document upon which a determination is based.

2. Change of Ownership, Tenancy, or Management.

The legal nonconforming status of a use runs with the land, and is not dependent upon ownership, tenancy, or management, provided the nature, character, intensity or occupancy classification of the use does not change.

3. Maintenance and Repair.

Ordinary repairs and incidental alterations to correct deterioration or wear may be made to buildings containing a legal nonconforming use, provided the cost of such repairs in any twelve (12) month period does not exceed twenty-five percent (25%) of the assessed valuation of such building or structure as established by the most current County Assessor's tax roll. Minor maintenance and repair includes such things as painting, roof repair and replacement, plumbing, wiring, mechanical equipment replacement, and weatherization. Incidental alterations may include construction of nonbearing walls or partitions.

4. Expansion or Alteration of Uses Established with Planned Unit Development or Site Plan Approval.

Applications for expansion or alteration of existing nonconforming uses which have been established pursuant to a valid planned unit development or site plan approval from the county may be considered, subject to the following:

- a. All applicable conditions of the planned unit development or site plan approval shall be fully complied with; and
- b. The responsible official may apply specific standards of the zoning district in which the planned unit development or site plan was approved, rather than standards of the underlying zoning district, as deemed necessary to ensure compliance with this chapter.

5. Other Expansions or Alterations.

Other than as allowed under Section 40.530.010(F)(4), a legal nonconforming use shall not be enlarged, expanded, or extended to include a portion of a structure or site it did not previously occupy on the date said use became nonconforming. For the purposes of this section, the term "enlarged, expanded, or extended" shall include, but not be limited to:

- a. Increased hours;
- b. Increased services or programs;

- c. Increased number of residential dwellings;
 - d. Interior renovations or structural additions that increase the occupant load of the structure dedicated to the nonconforming use;
 - e. Any new structures accessory to the nonconforming use;
 - f. Expansion or replacement of the structure (or portions thereof) dedicated to the nonconforming use; or
 - g. Anything beyond regular maintenance and minor repairs.
6. Change of Use.

The legal nonconforming use of a building, structure, or land may be changed through the site plan review process in Section 40.520.040, subject to the following:

- a. Permitted Use in the Zone.

A conversion from a nonconforming use to a use permitted in the zone shall require site plan review under the provisions of Section 40.520.040 to ensure compliance with applicable development standards. Whether the application is a Type I or Type II will depend on the criteria in Section 40.520.040(B). Once converted to a permitted use, the nonconforming use may not be re-established.

- b. Different Nonconforming Use.

A legal nonconforming use may be changed to another nonconforming use, subject to a Type II site plan review, only if all of the following conditions are met:

- (1) The proposed new use must have equal or lesser overall adverse impacts to the surrounding area considering such factors as traffic, required on-site parking, hours of operation, noise, glare, dust, odor, and vibration.
- (2) The proposed use will not introduce hazards or interfere with development potential of nearby properties in accordance with current zoning regulations.
- (3) The change in use will not result in an increase in the amount or area devoted to outdoor storage of goods or materials.
- (4) The proposed new use will not increase the amount of space occupied by a nonconforming use.
- (5) The proposed change in use will involve minimal structural alteration.
- (6) The responsible official may impose conditions to ensure compliance with subsections (F)(6)(b)(1) and (2) of this section.

(Amended: Ord. 2012-12-23)

7. Restoration of Damaged Building or Structure.

A building or structure containing a legal nonconforming use that is damaged by fire, flood, explosion, wind, earthquake, war, riot, calamity or other catastrophic event may be restored or repaired as follows:

a. Partial Destruction.

If the extent of damage does not exceed sixty percent (60%) of either the square footage or assessed value of such building or structure as established by the most current County Assessor's tax roll, the building or structure may be reconstructed to the footprint existing immediately prior to the time of partial destruction.

- (1) A building permit application for said restoration shall be filed for within one (1) year of the date of damage or disaster.
- (2) Restoration/reconstruction shall be completed within two (2) years from the date of partial destruction.
- (3) Upon receiving a written request, the responsible official may through a Type I review process extend the above time limitations for special circumstances beyond the control of the owner of said building or structure.

b. Substantial Destruction.

If the extent of damage exceeds sixty percent (60%) of either the square footage or assessed value of such building or structure as established by the most current County Assessor's tax roll, the building or structure shall not be repaired, reconstructed or reoccupied for any use unless such use conforms to development requirements of the zoning district in which the building or structure is located.

8. Discontinuation of Legal Nonconforming Use.

If a legal nonconforming use of land is discontinued or terminated, it shall not be re-established. Any subsequent use of the building or land shall conform to requirements of the zoning district in which it is located.

- a. A use is considered discontinued if customary operation of said use has ceased for a period of twelve (12) months or more.
- b. The responsible official may, through a Type I process, grant an extension to the timeframe identified above, provided the property owner submits documentation demonstrating there was no intent to abandon the use. Documentation may include, but is not limited to, the following:
 - (1) Requests for approvals necessary to re-establish the use or structure submitted to appropriate county, state and federal agencies within twelve (12) months after the use was discontinued;

- (2) The property or structure has been involved in litigation;
 - (3) Disputes in insurance settlements in the case of fire or casualty;
 - (4) Delay in transferring title due to probate proceedings; or
 - (5) Attempts to lease the site are ongoing due to:
 - (a) The length of time involved for marketing the premises; or
 - (b) The structure is a specialized type of building requiring a specialized type of use due to equipment, processes or configuration.
- c. A statement from the property owner merely stating that there is no intent to abandon is not sufficient documentation without a showing of additional actions taken by the property owner to re-establish the use or structure.

G. Nonconforming Landscaping and Screening.

On a lawfully developed property which is nonconforming as to landscaping or screening, a change of use which requires site plan review under Section 40.520.040 shall be brought into compliance with landscape and screening standards in Section 40.520.040(E)(4).

(Amended: Ord. 2010-08-06)

H. Nonconforming Vehicles/Boats.

On any lawfully developed property which is nonconforming based on the presence of inoperable boats in violation of Section 9.24.010, after July 15, 2014, the owner and persons occupying the property must bring the property into conformance with current code within six (6) months.

(Added: Ord. 2014-07-13)

Compile Chapter

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October 12, 2016 - 12:55 PM

Transmittal Letter

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Court of Appeals Case Number: 48653-9

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Brief: Appellants'

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Petition for Review (PRV)

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